Stewartiana,

&c.

Stewartiana,

CONTAINING THE CASE OF

ROBERT II. AND ELIZABETH MURE,

AND QUESTION OF

LEGITIMACY OF THEIR ISSUE,

WITH INCIDENTAL REPLY TO COSMO INNES, Esq.;
NEW EVIDENCE CONCLUSIVE UPON THE ORIGIN OF THE STEWARTS,
AND OTHER STEWART NOTICES, &c.

TO WHICH ARE ADDED

CRITICAL REMARKS UPON MR. INNES'S PREFACES TO HIS
RECENTLY EDITED CHARTULARIES,
INTERSPERSED WITH DIVERSE ANTIQUARIAN MATTERS, &c.

BY

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PREFACE.

My chief apology for thus venturing to obtrude my facts and notions in respect to the different topics discussed in this Performance may be, that unless some, formerly submitted to the public, had been either assailed or questioned by the Gentleman to whom I allude in the title-page, they would never, in every probability, have seen the light. And having thought it incumbent—upon being elsewhere so advised—to answer and expose his errors and misconceptions—after all no very difficult exertion—in a legal matter rather abstruse, and generally uninviting—I was induced to attempt to compensate somewhat for its irksomeness and tœdium, by selecting and broaching others, that, however yet of an antiquarian cast, *might* possibly be *conceived* less liable to the imputation.

On examining, likewise, Mr. Innes's Preface to the recent publication of the Chartulary of Glasgow, in reference to his suggestions and objections to my view of the case of Robert II. and Elizabeth Mure, more things in it incidentally struck me to be equally erroneous, which led me again, for the first time, generally to look into the other Prefaces of his edited Chartularies, that not a little surprised me still, in certain respects, as a legal antiquary, and elicited the publication of my sentiments and impressions here, as I have accordingly done, under a fourth and closing article.

So arose the present Work, though in brief time, *gradatim*, as may be evinced by my original rather incomprehensive title—*Stewartiana*—that, unlike Charity, may not strictly cover within its wings, whatever *additional* sins, and *deviations* I may be amenable for—an exercise during the bland and genial influences of summer, (wherein I was more disposed to indulge,) I had never figured. One thing, however, seems clear, that such discussions and disceptations, while they involve points rather of an abstract kind, and but little connected with the material, or at least tangible interests and passions of human life—hence admitting of a freer and more temperate survey and scrutiny—tend above all things to advance and mature the questions at issue, by the necessary collision and interchange of facts and opinions. A great deal, too, has now been effected by the respective Clubs and Associations, in the way of publishing many of our ancient Memorials—that before were known only to few;—so it may be at length incumbent, after a more extensive and productive field is thus opened, to make the former the subject of fair and discriminative comment and criticism, whereby their marrow and essence may be better extracted, and their merits and excellencies—as well as defects—brought into a more striking and condensed focus. Better that *the ground* should be thus used and worked upon, in order to bring forth the ripened crops or fruits of which it may be capable, than allowed to remain fallow. In this manner "*quicquid* sub terrâ est, *in apricum proferet ætas*,"—the epoch having now arrived of fully turning the relative advantages we possess, either directly or indirectly, to account.

Owing to the way these lucubrations have originated, and the comparatively brief period devoted to them, there may possibly be both errors and omissions, which I shall be happy to acknowledge, and correct at all times; and with respect to the notices regarding Holyrood Palace, and the locality,* a slight one has

* See ps. 120–124.

just struck me, that, although somewhat awkwardly, I may insert here as the only remaining place available. In Young, the English herald's, account of the festivities, on the occasion of the marriage of Margaret of England to James IV of Scotland, in 1503,* (in virtue of an intimation by whom, joined with a crude *phantasy* of his own, Lord Rosslyn in a manner decided the Glencairn Peerage claim in 1797), there is mention of the great *chamber* at Holyrood Palace, whose hangings " represented the Ystory of *Troy* towne," and of the King's *hall* there, which had corresponding delineations of the " story of the old *Troy*." In a grant by James VI, to Alexander Master of, and afterwards Lord Elphinstone, of the " houses and kitching of ye Convent of ye Monastery of Halyrudhous," the same are said to be bounded on the *south* by " the Commendator's† manse, commonlie callit the Commendator's dwelling place, and *yaird*, *callit* ye *seidge of Troy*."‡ Query, could this *yaird* have been curiously so named from its juxta-position to the previous chamber and hall, or—the classical subject of Troy being a favourite one with us—could the Drama of Troy, both orally and *practically*, upon pageantries and Royal Festivals, have been enacted on the site mentioned, which still, in consequence of such *delectable* association, retained the relative name, even during the grave and austere periods after the Reformation, on the sad eclipse or expiry of our former innocent merriments and " jocosities ?"

Edinburgh, August 1843.

* See Leland's *Collectanea*, Edit. 1774, Vol. iv, p. 258.

† That is, of Holyroodhouse, the Abbey of which is contiguous to the Palace.

‡ It is referred to, without date, in a discharge by the Earl of Linlithgow to the Master of Elphinstone, 3d of Deeember 1631, in the Elphinstone charter-chest at Cumbernauld House, which contains many interesting old papers,—whose examination was allowed me with the liberality that distinguishes every member of that eminent and ancient family, alas, in these days, so much shorn of their once ample patrimony ! Elsewhere in the preceding Discharge, in 1631, the same subjects are called " ye houses and yaird *besyd* Halyrudhous."

CORRIGENDA ET ADDENDA.

Page 59, *line tenth* from foot, *for* quæ read qua.

,, 61, ,, 11, *for* virgatiss VIII, *read* virgatis VIII s.

,, 78, ,, *fourth* from *foot*, *for* contorteously, *read* contortuously.

,, 106, ,, 12, *add* word one *after* stinted.

Ibid. ,, *fourth* from *foot*, put comma *after* intellect, instead of previously after barren.

,, 111, ,, *eighth* from *foot*, in *last note*, *for* required *read* reigned.

,, 126, ,, *after* "Torphichen charter-chest," in *last reference* in the *notes*, *add* for the use of which I am indebted to the liberality of Lord Torphichen, the possessor.

(There are doubtless other casual Corrigenda, the unavoidable result of the suddenness and brief preparation of the Performance.)

SOME FURTHER *CORRIGENDA*.

Page 5, *line eleventh* from *foot*, insert *semicolon* after *subject*.
,, 8, ,, 3, add accent over *é* in *pronounce*.
,, 9, ,, *eleventh* from *foot*, for *where* read *which*.
,, 13, ,, 14, a *bracket* to follow *afterward*.
,, 18, ,, 16, for first *they* (*ibid.*) read *the offspring*.
,, 24, ,, *tenth* from *foot*, insert *one* after *any*.
,, 27, ,, *fifth* of *first note*, correct after *was*, thus, "admitted in Law to contribute his aid to its corroboration."
,, 28, ,, 11, for *efficiæ* read *efficaciæ*, and in line *third* from *foot*, *orders* instead of *order*.
,, 29, ,, 7, for "Setons *is*" read Setons *in*.
Ibid. ,, 19, insert a full, instead of the present stop after foret.
,, 51, ,, 15, insert *British* before *husband*, to supply a clerical omission.
,, 82, ,, 5, for *granter* read *grantee*.

Stewartiana.

I.—QUESTION OF THE MARRIAGE OF ROBERT II. WITH ELIZABETH MURE, AND LEGITIMACY OF THE ISSUE, INCLUDING REPLY TO CERTAIN RECENT OBJECTIONS OF MR. COSMO INNES.

THE question of the Legitimacy of the Stewarts, has been a "favourite study"—something more than a "legal play thing" or racket (as by some it might be viewed) to Scotch lawyers, during the 17th and 18th centuries;* and we might now, perchance, be behindhand in our forensic duties, *more majorum*, if we overlooked it in the present. These material facts have been ascertained, and cannot be disputed—that Robert II, when related to Elizabeth Mure, in the third and fourth forbidden degrees of affinity, and the fourth forbidden degree of consanguinity, lived for a long space in concubinage with her, during which "*prolis utriusque sexus multitudinem procrearunt*"—*during that* unhallowed, and in law, *incestuous* connection; till at last, resolving to marry, but discovering the double relationship between them, which was a bar to their marriage at common (Ecclesiastical) law, they then obtained a dispensation from Clement VI, in the 1347, for the purpose, in ordinary form.† After which it is in proof, that they did marry under authority of the dispensation,—Robert founding in 1364, in compliance with an injunction there, a Chaplainry,

* Especially Sir Lewis Stewart, Sir George Mackenzie, (Lord Advocate), and the Earl of Cromarty, in the 17th century, and Sir James Dalrymple, and Mr. John Gordon, in the 18th. To these we may especially add the acute Andrew Stewart, a lawyer, though not an advocate—besides Principal Innes, Father Hay, Messrs. Sage, Ruddiman, and other antiquaries, &c. &c.

† A full copy of the dispensation forms No. I. of the Appendix, where it will be referred to throughout.

in expiation of his former offence, which was, by received doctrine at the time, deemed an aggravated one.*

Nor is it denied, but on the other hand admitted, that the eldest son of this *multitudo prolis utriusque sexus* between the parties, was afterwards Robert III, who succeeded, certainly, *nominatim* under an Act of Parliament in 1373. In these circumstances, in a recent work,† I principally maintained, (1.) That Robert III was *born* in *incestuous* concubinage—that status then legally applying before the Reformation,—however odd it may seem at present, to the offspring of individuals so situated as his father and mother; and (2.) That such being the fact, Robert III in ordinary course could not be *legitimated*—from this legal bar of *incest*—by a *subsequent* marriage, *upon* a *dispensation* however now regular between his parents.‡ The following argument, and conclusion relevantly drawn in the consistorial case of Macalzean against Macalzean, in 1582, thus even after the Reformation, here may well essentially express my doctrine, and apply that "not onlie be *ye provision of ye lawis* of yis *realme*, bot alsua be dispositioune of ye common law, alsweill civil as canon, all sik persons *quha* are gottin or borne *out of merriage at sik tyme* as yer parentis mycht *not* (haue) leiffullie togidder bene *merriet*, are *bastardes*, and may not be *legitimat* be ye *subsequent meriage* of yer parentis; although ye said commoune law in *sum uyeris* caises hes indulgeit and grantit ye benefit of legitimatioun be virteu of ye subsequent meriage."‖ The case, I need hardly add to Scotch legal *antiquaries*, would have been totally different, had there been no such *incestuous* bar between the parents, and they had been *ab origine*, *solutus* and *soluta*. Then ordinary legimation *per subsequens matrimonium*, as *latterly* in the Macalzean argument, might have obtained, so familiar to us; and it is to be observed that such erroneously, without due attention, has been conceived,—even by the acute Andrew Stuart, who discovered the dispensation for the marriage of Robert, with Elizabeth Mure in the Vatican, in 1789, and minutely probed the point,§—to have

Important Specialty hitherto overlooked in the Stewart case.

* For a full copy likewise of the Charter of Mortification by Robert, of lands to found the Chaplainry in the year, and to the effect stated, which was singularly discovered long before the dispensation,—See also Append. No. II.

† Inquiry into the law and practice in Scottish Peerages, with an exposition of our genuine original Consistorial Law, &c. Edin. 1842.

‡ Ibid. ps. 515—519, 136, 137, 463, 464, &c.

‖ Act and Decreet Register of the Commissary Court.

§ See Supp. to History of House of Stewart, 1798, ps. 605—6, *et seq.*

been the simple point, and to engross the entire merits of the Stewart controversy. Nay more, Erskine in his Institutes of the Law of Scotland, fell into precisely the same error and misapprehension in reference to a similar case, that of Fleming in 1508, as will be shewn in the sequel, and for aught we know, various others, both lawyers and antiquaries.

The Stewart Dispensation in 1347 in relative form, has a legitimation of the offspring, which might sound startling at first, because if made lawful by the marriage, what occasion for a legitimation? but at any rate such was not held by us to impart full legitimacy, or to involve the right to high and important successions, much less to a kingdom*—from the natural and well-founded jealousy of the dominion and ambition of the Pope, always ready, like most Ecclesiastical authorities, to encroach or usurp. While Papal legitimations chiefly in Scotland, were for the purpose of enabling persons to enter into holy orders,† a matter even, as now admitted by Lord Aberdeen's Bill, within the privitive sphere of the Church, Papal rescripts, in reference to questions of marriage and legitimacy, will be shewn not to have been always total in their effects or import, but to have been in part controlled and modified by the law of the land. Indeed, as is notorious, even civil *legitimations* with us, though often in high and most comprehensive terms, as if imparting complete legitimacy, are yet, as was strikingly found by a decree arbitral of James VI, in the Crichton of Sanquhar case, to be but very narrowly construed. In that of Stewart there was none.

Effect of Papal Legitimation.

In reference to my preceding doctrine, published in the work mentioned, Mr. Innes,—who now enters the lists of the Stewart controversy,—in his preface to the first volume of the Chartulary of Glasgow, which has been just published, and circulated to the Members of the Bannatyne and Maitland Clubs, has these converse or opposing comments: "A fine point has been raised by a learned writer, as to whether the papal legitimation could render *these* children, (of *Robert and Elizabeth*,) "born in incestuous concubinage," *capaces successionis in regnum.* (Riddell on Peerage and Consist. Law, I. c. 6.) Perhaps the modern enquirer will be better satisfied with the legislative act in their favour,

* Struvius in *Jus Canon*, (p. 324,) says Papal legitimations could not make bastards "capaces successionis in *regnum*."

† See as to this, *Gordon* at p. 17. He and Craig disown them *in civilibus*.

(Parliament 1373;) but for the zealous antiquary who does not despise such enquiries, I would suggest, (1.) that it is by *no means proved*, or *certain*, that there was *not* a *formal marriage* between the parties, *before* the birth of those children, though the Papal dispensation is *bound* to *assume* that a marriage which *ex concessis* was *uncanonical*, *did not exist*. *But* (2.) *this incestuous* concubinage, in plain language, the *connexion* of parties *related within the fourth degree* of consanguinity, (which might be said if they were the great grand children of cousins-german,) with the *other objection* more *shadowy* still,* are *not impediments lege naturæ*, nor by the law of Leviticus, but imported by the canons; and *what* the *canons* could *create*, the *authority* of the *papal rescript* could *dispense with*, *(obviously, from the context, including the above impediments in toto, with their effects, to give any point or meaning to the argument)*. This the canonists, and all other lawyers, admitted."†

Mr. Innes's Objections.

Mr. Innes has thus prominently introduced and broached the topic in the preface of the compilation referred to, owing to which, and his questioning, if not attacking my notions or propositions, I must, of necessity, now meet him, and go into a rejoinder. That I accordingly shall next do, with the view likewise, so far as I may be able, of putting important points of law upon their proper ground, with which he, however given by his own admission and predilections, (with what effect may be seen in the sequel), to others of the same kind, though of an inferior grade,‡ as some think, would not appear to be very familiar.

Although the preceding certainly *somewhat* novel and peculiar tenets of the learned gentleman are thus laid down *ex cathedra*, it may strike most legal antiquaries as strange, that they are quite gratuitously risked without the support and countenance of a single reference or authority—a mode of discussion most especially to be deprecated in Scotch matters—where once it *abounded*, and perpetually misled, and since the good times of

* Mr. Innes must here allude to the bar, or objection by the other relationship between Robert II, and Elizabeth Mure, through *affinity*,—and to such like,—a very solid one however, from what will be seen. It must be confessed that his suggestions or arguments, generally are not given with that very clear and definite enunciation so indispensable in every *subjecta materies* for discussion, which must apologize for any misconception on my part.

† Registrum Episcopatus Glasguensis I. Pref. p. xl.

‡ As to this hereafter.

Lord Hailes, has been ever rejected by the former. The two grounds of argument of Mr. Innes—thus unsupported, (for the question is entirely begged), I propose to reverse in the discussion —which may not be material,—and shall therefore *begin (hibernicé)* with the *last*—as of the two, possibly, though neither are *very formidable or appalling*—as may be perhaps already apparent—a shade even less "shadowy," to use his own term, or futile than the other.

The outset of the argument, then, (under No. 2), partly seems, that as the prohibited degrees of relationship, by consanguinity and affinity, founding the legal incestuous connection between parties within the pale of such propinquity—though everywhere peremptorily recognised, and admitted before the Reformation—the only period to be considered—and an express and strict rule of common (Ecclesiastical) law, are *against*, or not warranted by, the law of nature; therefore they were exceptionable, and as would follow, may not be imperative. I really can make nothing else of the marked *antithesis* here of the law of nature, which otherwise would be inept, and not in its natural place—it being obviously advanced as a disclaimer or contradictor of the conceived legal force and effect of the enacted degrees in question.

His exception of the Law of Nature to the fixed prohibited degrees before the Reformation considered.

But the *Law* of NATURE—what more indefinite and loose?—WHAT *is* the Law of Nature to modern perception?—what a test or illustration in a point of abstract, technical, and municipal law—authorised and enforced as it was by Scotch practice and statute? *Quot capitum vivunt, totidem studiorum millia;* and to speak more briefly, *Quot homines, tot sententiæ*, so that few men can *naturally* think alike upon one subject while coupled with the desperate and deceitful state of the *mind* of man,* the most discordant conclusions would on all hands arise, if thus given to *its own* cameleon influences—which none can fix—inducing the utmost chaos and uncertainty. It was in consequence of this, I apprehend, that latterly the chair of "the law of nature and nations," in the University of Edinburgh, became a mere blank, and was finally suppressed,—the sole benefit derived being by the professors, who, instead of foundering in such a *mare magnum*, with true Scotch sagacity and perception, only made the chair, or rather its abstract endowments, (for it was entirely mute) a

* Upon the highest authority, "the heart is deceitful above all things, and desperately wicked, who can *know* it?"

matter of purchase and sale. Nor did the addition of the law of *nations* mend the case, it was just one *de omnibus* rebus, et *quibusdem aliis*. But the singularity here is—letting alone the *immense check* that ordinary sexual intercourse, to the exclusion of lawful marriage, would receive from the rule—that in order to assail or detract from the more distant *instituted* incestuous connections of parties, Mr. Innes objects to them, that they are not authorised or countenanced by his proposed standard or paragon of the law of nature. Why, again, this is what is termed in law, proving too much—it is vulgarly falling from the grid-iron into the fire, it would rivet *incest*, if there is such a thing, in the most flagrant manner. The *paragon* would be worse than the stigmatised evil; for, going back to the law of nature, in the purest and strictest state—thus affording the best test and illustration—or with Scotch Metaphysicians last century, to "man in the savage state,"—(with which, to the amusement of our neighbours, they always began their discourses) —we would find nothing else but aggravated incest of the deepest dye—in the case of the sons and daughters of Adam, nay, elsewhere, of fathers with their daughters—trampling on all hands upon marriage; independent of the close imitation in this respect, of brute animals, doubtless begun in the golden age of Paradise, in admiration of their superiors. All the touching and eloquent arguments here put by Ovid into the mouth of Myrrha, to justify her passion for her father, Cinyras, (the fruit of which was the beautiful Adonis,) and whose name has been even identified with a fine essence, might be additionally pleaded*; and conclusions might be arrived at, that might well terrify a respectable man like Mr. Innes. But further still, Sir William Hamilton, in his late Pamphlet against the "Free Church," strikingly confirms me in this respect, by what he shews occurred at the period of the Reformation, when the old "*Papal discipline*" and the previous prohibition of marriage—thus be it observed—affecting the ac-

Might induce the most baneful consequences.

* "*Felices* quibus *ista licent, humana* MALIGNAS
Cura dedit *leges:* et quod NATURA REMITTIT
Invida jura NEGANT; gentes tamen esse feruntur,
In quibus et nato genetrix, et nata parenti,
Jungitur, et *pietas* geminato *crescit* amore," &c. &c.

Myrrha is here quite with Mr. Innes, an advocate for Natural Law, as opposed to human or institutional law, which she decries and would reject, but in which last category, are certainly included the forbidden degrees of relationship.

tual prohibited degrees of relationship—so much decried out of place by Mr. Innes—were discharged; and men, quite unrestrained, left to their free will and *natural* law. What was the consequence of this? Why the learned Professor informs us, the *denial* " in every relation," of " the existence of chastity, as a physical impossibility," thus going far beyond the dissoluteness of Papacy, whose baneful restraints were now removed,—and be it added, under the countenance even of Luther, and " the ascetic timorous Melancthon." Nay, still more horrible, these preached " Polygamy—incontinence, adultery," and to come to our old topic, in verification of what I said, " *incest*, even, as not only allowable, but if practised under the prudential regulations (laid down) unobjectionable, and even praiseworthy. The epidemic, Sir William feelingly states, " spread; a fearful dissolution of manners throughout the sphere of the Reformers' influence, was for a season the *natural* result."* Mr. Innes's test or redarguing authority,† the eligibility of which may be now obvious—as well as drift of his inference or argument, compromises *our* general law of marriage and legitimacy; indeed, much of the consistorial law. Natural children might thus also become lawful or authorised children—by the law of nature. And the former, at the same time, might affect many of the best civil and political institutions of enlightened society, which, so far from being shaken by vague or metaphysical speculation, ought to be firmly and rigidly upheld by the special human rules and practice that give them birth. Nor can it be disputed, that by the legal doctrine, *applicandi singula singulis*, the prohibited degrees must be peremptorily respected, and allowed full weight, in the face even of Leviticus or the Bible, as might be thought, instead of being christened " shadowy" or phantoms—*during* the æra of their legal reception, and when in force.

It is quite irrelevant.

* See " Be not Schismatics, &c. by mistake."—ps. 7-8.

† I suspect Mr. Innes (after Myrrha,) will only here find a strict champion for his *lex naturæ* in the young widow of an old respected professor of civil law in a German University, according to the story in the German *facetiæ*, who, on his death, to the horror of his learned fraternity and kindred, at once joined herself to a stalwart rustic hind; but she answered their objections and arguments by maintaining —— having got *something* of the style or air of *disceptation* from her departed, the more likely to be sooner catched by a woman—but little more, that if her old master was versed *in lege civili*, yet her new was more proficient " *in lege naturali, qui melius et plenius castellum meum oppugnat,*" &c. " His *adductis rationibus*" (of course including the *natural* law,) she then quaintly and *formally* proceeds in her defence, and *further analysis*, &c. So this law, it would seem, *may* cover a multitude of sins and errors.

Remainder of Mr. Innes's objections, under No. 2.

I next come to the concluding part of Mr. Innes's argument, (under No. 2,) where he, as futilely as in the previous instance, vaguely bases his exception and inference, not *trop bien prononce*, in regard to the Stewarts, upon the Law of Leviticus, the *Roman** Canon Law, and Papal Rescripts. But here, at the same time, it may be difficult to see how the latter can relevantly bear him out, either alone or taken with his natural law, as *may perhaps* at least be evident in the sequel—what falls *ante omnia*, nay, *exclusively* to be considered in the case, and to which, therefore, we *must* confine ourselves, independent of Leviticus or aught else, is —what was the *Scotch* canonical or ecclesiastical law in the matter *before* the Reformation? However the Roman canon law might operate as a general rule, still it is indubitable, and admitted on all hands, that even during Papacy, every European country had its own *peculiar* canon law† modified more or less; and accordingly, I maintain, in direct opposition to Mr. Innes upon such modified or pure Scotch ecclesiastical law, that by every relevant and technical principle must govern, the following propositions :—

I. That parties in Scotland related within the fourth forbidden degrees of consanguinity and affinity, or even in more distant spiritual relationship, as that of godfather and godmother, godfather and god-daughter, &c. were imperatively barred by the indefeasible canons of Scotland at common law, before the Reformation, from marrying; and that if such did marry, the marriage was confessedly unlawful—while the issue were indisputably thereby, in ordinary course, bastards.

Prohibition of marriage between the forbidden degrees not "*shadowy*" but indefeasible at common law.

II. That even a lawful marriage, celebrated in *facie ecclesiæ*, *upon* a papal *dispensation*, obtained by the foregoing parties, removing the impediments to marriage at common (Ecclesiastical) law, did *not*, however, in Scotland, operate *retro*, (where there had been no antecedent marriage uncanonical or putative between

* This seems clear from the context, (see p. 41.) and I need hardly add what is so notorious, that the general phrase "canon law" unqualified ordinarily, denotes (per *excellentiam* as thought) the *Roman* canon law.

† "It should be observed, that in addition to *it*, (*the Romish* canon law,) every nation in Christendom had its own *national* canon law, composed of legantine, provincial, and other ecclesiastical constitutions."—Butler's *Horæ Juridicæ Subsecivæ*, p. 780.

them,*) or legitimate their offspring before born during the subsistence of the said impediments,—*Here*, in the *last* case, *quite contrary to Mr. Innes, the Pope could* NOT UNDO *the Canons.*

Papal Rescripts could not wholly undo the Canons—at least in the Stewart case.

It will be observed, that he has said unqualifiedly, that the Papal Rescript could dispense with the Canons.†

These heads likewise go to prove, that the denounced prohibitions by Mr. Innes, in reference to marriage and legitimacy, embracing the degrees of affinity, were all something more than the "shadowy" flittings, or elusions, as it were, into which he first would appear to transform them. The latter propositions, under No. II. involve the case of the Stewarts,—with *which* we *strictly* have *alone to deal*;—and I shall next proceed to establish both them and the former.

I. PROOF, *that parties in Scotland, related within the fourth forbidden degrees of consanguinity and affinity, or even in more distant spiritual relationship, as that of godfather and godmother, godfather and god daughter, &c. were imperatively barred by the indefeasible canons of Scotland at common law, before the Reformation, from marrying, and that if such did marry, the marriage was confessedly unlawful,*—while the *issue* were indisputably thereby, in ordinary course, *bastards.* In support of which there are the following valid authorities.

1. The sixty-fifth canon of the Romish Church of Scotland, where, after prohibiting "Clandestina matrimonia"—adds "*matrimonium prohibitum* est infra *quartum* gradum *consanguinitatis*, vel *affinitatis*—inter *compatres*, et *commatres*, et inter filium et filiam, et inter susceptum et susceptam, et filium et filiam suscipientis,"‡ marriages between whom are here again literally *interdicted.* The prohibitions in the latter instances obviously strike at the more abstract spiritual relationships mentioned, of godfather and godmother (then unmarried and otherwise strangers) between their son and daughter, the godfather and god-daughter, &c.

2. Dispensation by Pope John XXII. in 1326, for the marriage between a noble man, Andrew Murray of Bothwell, and a noble

Cases of prohibited degrees by consanguinity.

* The specialty of an uncanonical marriage in the circumstances foreign to the case of the Stewarts, and how it may act in conjunction with subsequent Papal procedure, will be exemplified elsewhere.

† See p. 4.

‡ Chartulary of Aberdeen, Ad. Lib. These canons are also published in the first volume of *Concilia Magnæ Britanniæ.*

woman, Christian de Seton, allowing them both to marry, notwithstanding they were within the *fourth degree* of *consanguinity*, there said to be interdicted by the canons and in law.*

3. Judgment or sentence by the delegates of the Official of St. Andrews within Lothian, dated last of January 1541, whereby they dissolve and annul the marriage celebrated *in facie ecclesiæ*, between James Striveling of Kier and Janet Striveling, daughter and heiress of the late Andrew Striveling of Cadder, " ejus *pretensam* et *putativam* sponsam," at his instance, because " tempore ejusdem contractus, et solempnizationis de facto, licet *non de jure*, sibi invicem—Jacobus et Janeta *attingebant*, prout etiam de presenti attingunt, in *tertio*, *et quarto gradibus consanguinitatis*." It is therefore decreed, " that the marriage a *principio non* tenuisse nec viribus subsistere posse *de jure*."† It can also be fully proved that both these parties thereafter were respectively married to others.

4. I must next take the liberty of introducing Mr. Innes to an authority that we legal antiquaries at least much prize, and from which he possibly, upon fuller acquaintance, may reap benefit and information. I mean Lord Hailes' Case for Lady Elizabeth Sutherland, in her claim, as the heir-female to the Earldom of Sutherland, (decided in 1771,) where his Lordship has these remarks in reference to *Alexander* Sutherland, undoubted bastard son of John Earl of Sutherland, who died in 1508. " If *his* mother, the daughter of Ross of Balnagown,‡ was in the degree of *fourth* in kin to *John* Earl of Sutherland, (the *above*,) and had *married* him without a papal dispensation, the offspring of that marriage would, in the times of Popery, have been *as completely illegitimate* as if the mother had been the most abandoned low prostitute in the kingdom; with this difference indeed, that the Earl of Sutherland, in the reign of James IV. by marrying the prostitute,‖ would have legitimated the child; whereas a child born to him by his cousin could not be legitimated without an expensive interposition of Papal authority."§ Here his Lord-

* Andrew Stuart's Supp. to House of Stewart, p. 429.

† Register of the Official of St. Andrews within Lothian, in Her Majesty's General Register-House, Edinburgh.

‡ Alexander's *alleged* mother.

‖ Of course a *soluta*, and unrelated.

§ Sutherland Case, Chap. VI. p. 139. The last contingency adverted to will be sufficiently explained in another place. The Pope could by a certain method confirm

ship well lays down the law. He had no such " shadowy " view of the prohibited degrees as Mr. Innes, but held them to be very solid, decisive, and fearful impediments. Such introduction, as I have above tendered, of Mr. Innes to the former, may be the more incumbent, because although Lord Hailes has usually been regarded a great landmark and bulwark in the department of our old laws, Mr. Innes appears to entertain rather a confused or indistinct notion of this personage, and falls into a signal error respecting him, as will be shown elsewhere.

Cases of prohibited degrees from affinity.

5. Dispensation by Pope Clement VI, in 1347, for the marriage between Robert II, and Elizabeth Mure, which was previously legally barred by their double relationship in the *third* and *fourth degrees* of *affinity*, and *fourth* of *consanguinity*.*

6. Judgment or sentence of the official of Saint Andrews within Lothian, in 1515, whereby they dissolve the marriage between Mr. George Knollis and Dame Christian Edmeston, Lady Halket, at her instance, because Gresilda Rettray, the first wife of Mr. George, was in the *fourth* degree of consanguinity to Dame Cristina, which made the latter, and the former her putative spouse " in *eisdem* gradibus *affinitatis*." †

7. Sentence or judgment pronounced the 21st of January 1535, by the same Judicatory of the Official of Saint Andrews within Lothian, in a matrimonial case at the instance of David Schaw, the pursuer, against Agnes Dawson, the defender, ejus sponsam *putativam*,—whereby they found " *pretensum* matrimonium inter dictos—de facto et *non de jure* contractum, et in *facie ecclesie* solempnizatum, *ab initio in se nullum* et *invalidum*, ac contra sacros canones celebratum, *causante impedimento subscripto*, ex, et pro eo quod *ante* contractum solempenzationem prefati pretensi matrimonii, dictus David *carnaliter cognovit* quandem *Mergaretam Preston*, que quidem *Mergareta* et *dicta Agnes* sibi invicem *attingebant* tempore contractus, et solempnizationis dicti pretensi matrimonii, sicuti de presenti attingunt, in *tertio et tertio gradibus consanguinitatis de jure prohibitis, et ex consequenti*, ipse David et dicta Agnes *pretensa* sponsa in *eodem gradu* AFFINITATIS *attingunt*. *Propterea* prefatos David et Agnetam abinvicem separandos, atque

a previous marriage between parties so allied, defective in form,—a matter, however, quite foreign to the Stewart case, where no such previous marriage had obtained.

* See Appendix, Nos. I and II.

† Register of the Official of Saint Andrews within Lothian, *ut sup.*

*divortiandos fore** atque separamus et divortiamus causante impedimento prescripto, PROLESQUE inter ipsos, eodem subsistente, susceptos et procreatos BASTARDOS et ILLEGITIMOS fore causantibus ex deductis coram nobis, *decernimus* et *declaramus*," *&c.*†

Resemblance of this case to the Stewart, but the latter worse, not being thus *in figura matrimonii.*

The *affinity* between Robert II. and Elizabeth Mure, in the third and fourth degrees, was constituted precisely in the same way as the above, because he " carnaliter cognovit" Isabella Boucellier, related to Elizabeth, " in tertio et quarto—consanguinitatis gradibus," previous to his concubinage with the latter, as is set forth in the Dispensation in 1347.‡ But then again, he was related over and above to Elizabeth, in the fourth degree of consanguinity, which made that case much more aggravated.‖ Alas ! it would seem, Mr. Innes has come too late into the world —It is to be regretted he had not figured as a reformist during the time of the previous unhappy offspring in 1535, to rescue them by means of his " shadowy" argument, (backed, too, by the law of nature), against the fatal affinity of their parents—which he holds as an impediment, to be a *fortiori* " *more* shadowy *still*,"—from the dire stigma of bastardy.

Cases of prohibited degrees from abstract spiritual relationship.

8. Dispensation granted by Pope Clement VII, in 1378, for the marriage between Robert Bevathin, and Egidia Stewart, both of the diocess of Glasgow, removing the legal impediment, " cognationis spiritualis," between them, " quia *pater* naturalis dicte Egidie *prefatum Robertum de sacro fonte levavit* ;" in other words was Robert's godfather, and allowing them to marry.§ This was a case of marriage of the *filius* suscipientis to the genuine or natural daughter of the latter.

9. Sentence or judgment of the official of Saint Andrews, the 20th of February 1548, in a matrimonial case between Majory Forrett, the *putative* spouse of David Inglis and the latter, whereby the Tribunal decern their " *pretensum* matrimonium—de facto et *non de jure* contractum *ab initio fuisse*, et esse *nullum*,—*ex eo quod* Joannes Forrett de Fingask *pater* dicte merjorie sponse putative dicti davidis *eundem davidem de sacro fonte levavit*, stante

* Of course, *a vinculo* by reason of original *nullity.*

† Register of the Official of Saint Andrews, *ut sup.*

‡ See Appendix No. I, and that such carnal connection constituted forbidden degrees of affinity, is proved by the charter 1364, that immediately follows, *Ibid.* No. II.

‖ See No. I, *Ibid.* No. I.

§ Printed at full length in Supplement (ps. 441-2) of Andrew Stuart's Genealogical History of the Stewarts. *Bethune* was probably Robert's name.

igitur hujusmodi impedimento cognitionis spiritualis inter dictam merjoriam et Davidem," &c. Therefore, divorce *a vinculo*, with liberty to each to remarry, follows as a matter of course.* The spiritual relationship in this instance was obviously the same as in the case of Bevathin and Stewart, in 1378, which last, however, was removed by dispensation.

II. PROOF, *that even a lawful marriage, celebrated in facie ecclesiæ, upon a Papal dispensation, obtained by the foregoing parties, removing the impediments to marriage at common (Ecclesiastical) law, did not, however, in Scotland operate retro (where there had been no antecedent marriage uncanonical or putative between them,) or legitimate their offspring before born, during the subsistence of the said impediments, (whatever contrary effect it had upon issue born afterward.*—This comprises *the* STEWART CASE.

Cases of incestuous children born before a valid marriage of their parents upon a Dispensation, involving the *actual* CASE of the STEWARTS, which children, in ordinary course, were spurious, and not legitimated by their parents' marriage.

1. By evidence, to be immediately referred to, it will be proved that John Lord Fleming, and Margaret Stewart, a daughter of Mathew Earl of Lennox, both figuring at the beginning of the 16th century, were within the second forbidden degree of *affinity*, owing to Margaret having been carnally known by James Lindsay, who was in the second degree of consanguinity to Lord John. In these circumstances, the noble parties having resolved to marry upon dispensation, which was here imperative, John Lord Fleming, with an eye to the marriage, made settlements accordingly, and especially obtained, upon his resignation, a charter from James IV of his estates, dated March 12, 1508, in favour of himself, and the heirs-male between him and Margaret. But the charter moreover contains these important clauses :— " Insuper *si* CONTINGAT *aliquos filios* et proles masculos, unum aut plures *inter* ipsos Johannem et Margaretam *procreari*, ANTEQUAM *legitima* DISPENSATIO *matrimonii* inter eosdem, *ad istas partes a curia Romana devenerit*, et desuper *executum fuerit*, et ANTE *complementum* et *solempnizationem* contractus predicti MATRIMONII in *faciem ecclesie, nos*, ex *nostris gratia* et *favore*, &c. dedimus et concessimus—*dicto filio*, et *filiis* et prolibus *masculis*, &c. inter predictum Johannem et Margaretam ut premittitur, pro-

* Register of the official of Saint Andrews, in Her Majesty's General Register-House, Edinburgh.

creatis seu procreandis, liberam facultatem, &c. ut *ipsi* et eorum aliquis libere et licite disponere valeant, &c.—in toto tempore vite ipsorum—de omnibus et singulis terris suis—bonis mobilibus et immobilibus, &c.*—*non obstante* quod si *contingat ipsos* BASTARDOS *procreari*, et *privilegiis juris nobis* super *eschaetis* BASTARDORUM *concessis;* ac *etiam* dictum *filium et filios* ac proles, LEGITIMOS *fecimus* et LEGITIMAVIMUS—in omnibus et per omnia, AC *si de legitimo thoro essent procreati.*" And there besides follows, with other insertions, as clearly marking the bastardy of this future issue so happening to be born before the arrival of the prospective dispensation, a renunciation in their favour of the escheat of their bastardy competent to the Crown.†

There is here, therefore, indisputable proof, that by the law, children born in incestuous concubinage, by no means of near degree, not even by consanguinity, before the arrival and execution of the necessary dispensation for the marriage of their parents from Rome, were clearly illegitimate, and not held to be legitimated at common law by the subsequent marriage—thus presenting essentially in ordinary course the identical case of the Stewarts, though the latter obviously in its nature was more aggravated. It transpires, however, that no dispensation in the Fleming instance, had been obtained; for in the family charter chest,‡ there is a decree of divorce the 25th of October 1515, dissolving the marriage that had come to be celebrated by Lord John and Margaret, on account of the affinity premised from Margaret's intercourse with James Lindsay. But this does not shake the law as exemplified. The parties probably, as was by no means uncommon in that rather dissolute age, had become tired of each other, and hence mutually desired instead of fully legalizing it, to be freed of their engagement; for which, abstaining from the dispensation, there was a better pretext here than sometimes happened.

The *distinctive* features in this case of Fleming in 1508, with the peculiar specialty attaching thereto, ought, one would think, to be caught at first sight by any Scotch lawyer—the incestuous relationship, and necessity of a dispensation for the parties, being so evident; but, nevertheless, owing to whatever cause, or possibly from the effect of the Reformation in so far warping men's

* This, as can abundantly be proved, is a common clause in all legitimations.

† Great Seal Register. ‡ In Cumbernauld House.

views and ordinary penetration, through the medium of modern prejudices and prepossessions, Erskine, the author of the latest Institutes of the Law of Scotland, has gravely quoted there this identical Fleming precedent, to prove quite *generally*—" that legitimation, *per subsequens matrimonium*, was rejected by the ancient law of Scotland!" (See Instit. Edit. 1805. Append. No. II.) Just as if it involved an ordinary connection simply between a *solutus* and *soluta*, which is entirely different, and where there is no peculiar specialty! After this it is not surprising, that others have been similarly misled in the Stewart instance.*

Singular misconception of Erskine upon this head, in previous Fleming case.

2. A principal and relevant conclusion, as found in the action of *bastardy* in 1550, at the instance of Richard Rutherford of Edzerton, against John Stewart of Traquair, is that William Stewart of Traquair, John's father " intervenit *illegitimus* et *bastardus* declarandus, ex, *eo* quod *de* CONSUETUDINE et PRACTICA *hujus regni inviolabiliter observata ultra memoriam hominum* proles genitæ inter *consanguineos de jure contrahere vetitos ante* matrimonium, *licet postea* dispensatum fuerit inter hujus modi personas *super tali impedimento*, *matrimonio desuper subsecuto*, hujusmodi proles natæ et genitæ, *ante* prefatam dispensationem et matrimonium, predictum matrimonium et dispensationem subsequentem, *non* efficiuntur legitimæ quoad successionem paternam seu maternam."† This authority, therefore, is equally illustrative as the previous one of Fleming, involving the same case, which it fully corroborates; while it adds this most important fact, that the law in question was indigenous to Scotland, having been observed by the custom and practice of Scotland inviolably *ultra memoriam* hominum, which is especially and exclusively founded upon.

All children born of parents within the forbidden degrees, however remote, before the Reformation, incestuous and spurious.

* Every Consistorial Tyro knows that a connection between parties within the forbidden degrees before the Reformation, was *incest*, and the issue of course incestuous in the utmost sense, besides *spurii*, and *ex damnato coitu*, as they were likewise designated in the Canon Law, while *naturalis* referred to preferable illegitimates, the issue of a *solutus* and *soluta*. It is strange how difficult it is to impress this, however obvious, upon modern apprehension, partly misled by Mr. Innes's natural law, which may mean any thing. I will however prove the truism from Pirhing, " quid est *incestus*" he asks, to which he replies—" est *concubitus* cum persona *consanguinea* vel *affine* in gradu *prohibito*," and then he adds, that incest is committed " jure humano, inter *cognatos* et *affines* in linea laterali sine transversali *usque* ad *quartum gradum* inclusive." *In jus Canon, Lib.* V, *Tit.* XVI, *Sect.* III, § 1. A *concubitus* between parties, even so remote as in the latter instance, *was* like one between a brother and sister, so could not be legalized by subsequent marriage at common law. And for definition of *spurius* and *naturalis* see subsequent excerpts from Gordon, *De Nuptiis Roberti Senescalli*, &c.

† Original, Traquair Charter Chest.

3. As formerly shewn, we even trace the sure traces and results of the Scotch law in question, after the Reformation, in the relevant argument in the case of Macalzean in 1582,* shewing there could be no subsequent legitimation of issue, when born in actual concubinage, at a time that the parents were barred by an impediment, (which remote forbidden relationship certainly previously was,) from marrying. And to the same effect in an old MS. compilation of Scotch law and practiques among the records of the Sheriff-Court of Edinburgh, it is laid down, that issue, "ex coitu *prohibito non* possunt *legitimari*," including a "cognato."

4. But I now come to a striking corroboratory piece of evidence here,—that of an accomplished lawyer, both civilian and canonist, Mr. John Gordon, Advocate, and Professor of Universal History, Greek, and Roman Antiquities, in the University of Edinburgh, who wrote, in 1749, a Latin Treatise, *De nuptiis Roberti Senescalli Scotiæ*, &c.† thus the subject in question, but with what Mr. Innes has no way done a full reference to his authorities, chiefly from the canon law. His main error (for, like most people, he was not either immaculate,) was his holding gratuitously, with some countrymen, from their ardent attachment to the Stewarts, the wild notion of a marriage of Robert II. and Elizabeth Mure, *before* the dispensation in 1347, which, however, he never saw, and so far was in the dark. This, at the same time, coupled with more, (as will be seen,) was a most important fact in law, could it have been established; and upon such hypothesis he exclusively based the legitimacy of the Stewart issue. In other respects, he is for the most part well-founded and correct, as could not but be expected from an eminent and experienced lawyer. And what does this decided partisan and champion withal of the legitimacy of the Stewarts say in his treatise mentioned in their defence, in reference to the cardinal point under present discussion, upon which, in reality, the sole merits of the controversy rest? Why, however unconsciously, not seeing the fatal application, from

Concurring opinion even of Gordon, a good legal authority here, though a champion of the Stewart legitimacy.

* See p. 2.

† It is subjoined to the second volume of Goodall's edition of Fordun,—who styles him in the preface "*virum eruditissimum*." Gordon passed advocate at the Scotch bar in 1737, being the son of Mr. Gordon of Buthlaw, and was appointed Professor in 1753, as is proved by the Records of the Scottish Bar, and those of the City of Edinburgh. Dr. Irvine, among his distinguished classical accomplishments, a proficient civilian and canonist, calls him "a learned and able man," in alluding to his works, both as a lawyer and linguist, in his Lives of Scottish Writers. See Vol. II. p. 164.

being blinded as above, and misplacing his argument, he, Balaam-like, inversely, most confidently decides it against them.

He proves to demonstration, that issue, such as those of Robert II and Elizabeth Mure, in their identical situation, were undoubted bastards, in unison exactly with the cases cited of Fleming and Stewart, of Tracquair, in 1508 and 1550, while it turns out again in palpable refutation of Mr. Innes's hasty assumptions, that the doctrine there followed, and that I maintain, was *also* in accordance with the *fixed*, and not *mutable* Romish ecclesiastical law, as he* inculcates,—no doubt a general rule, as I further admitted, with us, though capable of modification. All this is quite established by these quotations from Gordon. "Sic Sanchez *naturales* liberos, *(those not incestuous*, but far preferably, of a *solutus* and *soluta,)* esse scribit, qui ex parentibus inter quos matrimonium absque dispensatione Pontificia *consistere potest*, citra nuptias nascuntur; *contra* ita conceptos natosque *ante dispensationem*, *(as the Stewart offspring,)* ex iis, inter quos *sine* dispensatione connubium *non* est, *uno omnium doctorum consensu* SPURIOS *existimari*;† &c. nec liberis ejusmodi, *natis ante dispensationem*, *ad jus* capiendi, *legitimas* hereditates quidquam proferre, *si* vel *maxime Pontifex in* sua *dispensatione de ipsis legitimandis* caveat, cum *quæ* Pontifici competit *legitimandi facultas* ad *actus ecclesiasticos* TANTUM *pertingat*, nec hic agitur de matrimonio coito adversus canones.‡" Here, too, he very summarily dispatches *Papal legitimations* in dispensations or Papal Rescripts, though they constantly occur there, and which Mr. Innes makes so irresistible. In confirmation of what I formerly said,‖ they habilitated merely for Ecclesiastical acts, or taking holy orders. Hence, we may further now discard that in the Stewart dispensation in 1347. But he likewise broaches *directly* the case of the Stewarts themselves, viewing it first as *undivested* of the *ideal ante*-marriage that he ascribes to Robert II and Elizabeth Mure, and supposes, of course, erroneously to have been confirmed by the dispensation in 1347, which certainly would have given a totally different tinge to the case; and here is his result, just the same again as before;

He quite discards with Craig, Papal legitimations.

In reality gives the case of the Stewarts against them.

* See p. 4.

† He here starts the case also, with which we have nothing to do, of children *conceived* before the dispensation, but born afterwards, whom some still think bastards, others not. I could prove, too, the preceding fact, of the illegitimacy in the text, by Continental authorities.

‡ That is, Putative marriages, far better than Concubinage. Treatise, *ut sup.* p. 11.

‖ See p. 3. Craig also rejects Papal Legitimations, see *de Feud*, p. 368.

—" *si sine nuptiis, (the ante-marriage,)* e libero lectulo *nati* fuissent, *(*the *Stewart offspring)* ad legitimationem natalium *per subsequens* patris matrisque *matrimonium*, (that after 1347;*) *nullo pacto pervenire potuissent*, quia, qua tempestate ipsi liberi nascebantur, inter parentes *propter cognationem* adfinitatemque, qua invicem contingebant, nuptias contrahi canonibus interdictum erat, ut *ni matrimonium* (the *supposed ante-marriage*) quod *deinde approbavit* DISPENSATIO intervenisset (assuming that not then discovered, according to his views, which it was not,) SPURII, *non naturales* liberi fuissent, nec ex concubinatu, sed *ex* INCESTU *geniti*, quales *legitimi per matrimonium subsequens non* sunt."†

The canons alluded to could not, as Mr. Innes asserts, be rescinded by the Papal dispensation in the previous crisis, which turned out to be the real Stewart case. The argument Gordon draws in defence of the legitimacy is amusing—that in the latter view, as they would have been surely bastards, while they yet *must* have been lawful, from the conceived later recognition of their Father and the Estates, &c. there must therefore have been his cherished ante-marriage in their favour, confirmed by the dispensation; which is the only way it seems to account for their legitimacy, and not the dispensation *abstracted* from such ante-marriage, as *proved*, anticipating and allowing the *canonical* marriage. But the discovery of the dispensation in 1789, besides other proof, destroyed such theory. He clearly, however, from what precedes, saw the marked bar to legitimation, from the forbidden degrees, which Erskine strangely could not discover in the similar Fleming instance in 1508.

Gordon's fallacy.

Conclusions upon the Stewart case *in hoc statu.*

How the Stewart case fares in its present phasis, it may not now perhaps be difficult to decern. The incestuous offspring of Robert II and Elizabeth Mure *in hoc statu*, could not have been legitimated by the subsequent marriage, but so far, were as before. It is now obvious, too, that what Mr. Innes, among his other misapprehensions, prescribes in the matter—of the Pope, through his sovereign authority, being able unqualifiedly, to annul the ruling Canons, and necessarily their effects—is not justified.‡ On the contrary, the status of incestuous offspring, and

Pope could not unqualifiedly undo the Canons.

* He of course assumes that there were *binæ nuptiæ*,—" one de *facto*, and the other *canonicé—impetrata* dispensatione"—ib. p. 11-12.

† Treatise, *ut sup.* p. 11.

‡ See p. 4.

those prospectively in the Fleming case,* not either through the nearer degrees of propinquity, born before the legal marriage of their parents, however backed by a Papal dispensation, was yet held, as before, to resist, and to be quite unaffected by the latter, still retaining its original character, which was exclusively referrible to the canons.

Papal legitimations, *ex figura verborum*, which abound in dispensations, and that would have been unavailing in the Fleming dispensation, after 1508, had it past,—on which account, there was then the *prospective civil legitimation*,—have now been fully disposed of for our purpose. The Pope, again, had only here a power *secundum quid*. Neither were his rescripts irresistible, nor could he, as we might conclude with Mr. Innes, dispense with every thing regarding status.†

Only remaining argument of Mr. Innes.

I now come to the sole remaining *argument* of the learned gentleman, (No. I,)‡ which I shall literally repeat, "that it is by NO *means proved*, or *certain*, that there was *not* a *formal* marriage between the *parties before* the birth of *those children*, though the *Papal dispensation is* BOUND to *assume* that a *marriage*, which *ex concessis* was *uncanonical*, did NOT EXIST." That is *inter alia* (so far as I can see, though there is evidently here and throughout his positions some distrust and indefiteness betrayed, so different from the firm tone and clearness of enunciation inherent in sure demonstration) that on the other hand it *may* be *proved* or certain, that there *was* not only a *marriage* between them *previous* to the dispensation, but a "*formal*" one, the presumptive meaning of which last unqualified term I submit to my legal brethren, imports with us a regular marriage. Less than *that* in usual consistorial language, has the prefixture of *putative* or *de facto*.

There was *no* marriage between Robert II and Elizabeth Mure, *before* the Dispensation, which at once here answers him.

Now I can here compendiously dispose of the entire *argument* —of this veriest *shadow* of a *shade*, unpalpable in form and reality —by at once *positively denying* upon relevant ground, that there *ever was* any *such* previous marriage. There is not a vestige of such a thing. I believe I may say I have examined more of Scotch public and private records than any one, with a reference always to our old laws and practice, and of course to the interesting case of the Stewarts, which, having been much professionally employed in Scotch cases of legitimacy, was never, by way of necessary illustration, out of view, and with whose merits at least

* See pages 13-14. † See p. 4. ‡ See *ibid.*

I may perhaps be allowed to be familiar,—but never unfortunately could by any luck stumble upon the least track or semblance of the kind. And I must *hereby* CHALLENGE *Mr. Innes* to *produce*, as he has not yet, the *relative evidence*, with its import and time of course—which we might almost conclude was not wholly out of his power, as independent of supporting the notion of the ante-marriage, he further condescends distinctively—however otherwise wrapt in silence and mystery—upon its having been a *formal* one. By his *own* language therefore, *he might* seem to know something at least *bodily* of the matter, by the publication even of which, he would doubtless much interest and gratify Antiquaries.

But I greatly fear the notion of the *ante*-marriage to those versant in the Stewart controversy, must appear a mere mistake or pretence, as Mr. Innes *might* on enquiry have admitted.

The idea of the *ante*-marriage, mere hallucination, invented to give the Stewarts the advantage of the issue in question, being born *in figura matrimonii*, and not in concubinage.

In fact it was a gratuitous fable and hallucination conjured up last century by courtly and legal arguers to gloss over, or palliate the nature of the connection, at any rate aggravated, and to be reprobated, between Robert II and Elizabeth Mure—while it served to *enucleate* another argument upon an inferred, but ideal contingency, because *holding* an ante-marriage, that *might* have been converted, and *hence actually* was (!) by the implementing act of the Pope, into a real marriage, with legitimation of issue of the ante-marriage.* Such favour was not improperly shewn to issue in the *conceived* latter predicament, who were said to be born in *figura matrimonii*, a halo unfortunately not environing the Stewart progeny. Among others I trace the fable in question to George Crawford,† the Royal Historiographer, who figured at the beginning of the eighteenth century and afterwards. He thus specially and with great *bonhommie*, and courtliness, in a yet unpublished MS. statement‡ gratuitously solves the material point. " My thoughts then of this matter, upon having *long considered* and *reflected* on it, with *all imaginable deliberation*, is that Robert, the Great Steward of Scotland, the heir-presumptive of the Crown, and the only person of his own family, that he might raise up heirs to secure the succession to the Crown, as wel as to carrie on the line and descent

Crawford's amusing fabrication, or story.

* The proof of this will be given at the close of this part of the discussion.

† He published a Description of the shire of Renfrew, and History of the Stewarts, in 1710, a Peerage of Scotland in 1716, and lives of the Officers of State in 1726.

‡ Apud Crawford's MSS. Collections, Advocates Library Edinburgh, Jac. V. 2, 44.

of his own sirene* house, *thought* it *incumbent* on him to marrie.† So in his *eighteenth year* (?) 1333, (he) fell *passionately* in *love* with a *young beautiful ladie*, a *near* cussin‡ of his own, *Dame*‖ Elizabeth, one of the daughters of a gentleman of quality and of a Knightly family, Sir Adam Mure of Rowallane and Polkelly. But then there was a bar in the way of makeing a laufull marriage according to the Canons, their relation in blood, that behoved to be dispensed with, and could not be removed so very quickly as the *young enamoured lovers* had a mind; for the sending to Avignon for the dispensation was a work of some time, but being *impatient* of a *delay*, and *intent* upon *enjoyment*, without staying for the dispensation, he *ventured* on a *marriage*, upon the *assuring*§ *his confessor no doubt* gave him, that it would be easilie obtained, and in *this state* of *marriage*, John Lord Kyle, afterwards King *Robert* the 3d, and some other of the King's sons, were born. But how soon the *great* Stewart came deliberately to *riflet*¶ on the step he had made, and to consider what objection lay against the issue borne in *such* a *marriage*, he soon saw** the necessity to sue for the dispensation. I CANNOT *really* condiscend on the *very precise year this was done*. But *I am sure* it *was done*," &c. &c.

Little did Crawford know at the time, being no canonist, that in his courtly attempt to whitewash what could not be blanched—no more than the dusky personage in the fable,—he was inculcating, as will be seen hereafter, what most directly tainted and bastardized the offspring in question, in thus making Robert and "Dame" Elizabeth all along fully aware—and not what would have been more fitting, all along *ignorant* of their forbidden relationship. *Such* "*ignorance*," however distasteful to the lady's pride at the time, would in fact be happy, or "*Gray's*" ignorance. And besides, Master Crawford, what think you of what your cotemporary, Father Hay—also a keen defender of the

Dangerous consequences from his statement.

* *Serene.*

† It may be safely said, the very last idea that then entered his head; the case was a mere one of seduction, whatever the *benevolent* writer might apprehend. Robert was a "gay deceiver," and had various liaisons with ladies whom he jilted, including the unfortunate Boucellier, (See Appendix No. I,) and natural issue of course, as is fully testified by the Records.

‡ Not *quite* so.

‖ This title she never had.

§ *Assurance.*

¶ *Reflect.* The Historiographer does not appear to have been an Orthographist.

** As if only then for the *first time.*

Crawford here at variance with Father Hay.

Stewart legitimacy—thus descants in the matter? "*If* the Steward *had* kept and enjoyed Elizabeth under the shadow of a private marriage *nullis factis aut adhibitis solemnitatibus*, (or uncanonical, as Mr. Innes would style it,) or if Elizabeth had kept company, or lived as wife with the King, whilst he was a subject, *spe dispensationis consequendæ*, John (afterwards Robert III.) who is supposed to have been born before the dispensation was brought from Avignon,—*would* certainly have been accounted a bastard, because his father and mother were in the forbidden degrees."* —Could your *beau-ideal* of a confessor have acted to your friend, as you represent?—But it is cruel to make such remarks depreciatory of the *benevolent* historiographer, dispelling at once his romantic and charming scene, the new, interesting, passionate love of the young pair, which, like that of Pyramus and Thisbé, could brook no delay, and ended equally in the ruin of the female, —their deep attachment, with the actual introduction of a *confessor*, even better than the nurse in Romeo and Juliet,—at least answering as well,†—to flatter, and pour balm into their wounds; as they besides may deprive Mr. Innes of the powerful argument —powerful, certainly, in comparison with any thing he has adduced, for he has adduced nothing—which he might have constructed upon this curious and original evidence that must have come from some sure though unknown receptacle, because Crawford, he might insist, had access to most of the charter-chests of his time. Why, Mr. Innes, in a kindred poetic vein, or some friend through him, might even convert the valuable ingredients into a play, under some such dramatic name as the "happy," or "blest guilty," with the advantage of a happy, and not sad catastrophe, as in the case of the other attached doves alluded to, who bring down tears from man, woman, and child. Nor would the "gods" be less pleased with the parties being like themselves in an elevated situation, or enacting in their lives what was so familiar and parallel in many of theirs, not overlooking their "dames." Alas, however, for that or any inspiration in consequence, we must sternly ask with Andrew Stuart in *his* controversy, *withal* for the *male representation* of the Stewarts,‡—in reply to equally

* Vindication of Elizabeth Mure, p. 107.

† As, for instance, in the noted tragedy, "'Tis *pity* she is a *whore*;" nay, again, in Schiller's *Mary*, the descendant of Robert and Elizabeth, while confessors elsewhere, are no unimportant persons in the buskin.

‡ In which, however, though he displays his usual research and acumen, he was, upon the whole, not so successful (in his own regard) as in the Vatican in the other

gratuitous garrulity *alone* opposed to him as here, by Mr. Williams his adversary.* "From *what quarter* did" Crawford "receive this information? How came he to be let into these family secrets, which appear to have been unknown to any other author?"† If, according to the satirical sally of James VI. when in Edinburgh, in 1617, against the learned Aristotelian disputants, "these men knew Aristotle's mind *as well* as *himself* did while he lived;"‡ so likewise might Crawford—if not also Mr. Innes—*apparently* that of the young "great Stewart," with his liaisons, &c. And if so, by some Pythagorean process, they might further even have been acquainted with him, and thus happily obtained from the same authentic quarter the document of the ante-marriage, which it is therefore most strange they cruelly kept *in retentis*.‖

Both Crawford's and Mr. Innes's objections gratuitous.

But gravely speaking, the case, plain though it be, does not rest here. We have besides explicit and convincing proof to all

case; but he was quite successful, nay, annihilating in his reply to the rival pretensions of Lord Galloway, who could even far less be descended, as he claimed, from William Stewart, brother of Sir John Stuart of Darnley, who fell at Orleans in 1429.

* The champion for the Earl of Galloway, the *other* claimant of the male Stewart representation, a most superficial and irrelevant arguer.

† Correct. Supp. to Hist. of Stewarts, 1799, p. 54. He also as pertinently and relevantly for me thus remarks, in regard to Sir William Stewart of Jedworth, Lord Galloway's ancestor, *dead in* 1403, and the *ideal* Sir Alan Stewart of Allanton, both yet *feigned* by Mr. Williams to have *accompanied* Sir John Stuart of Darnley to France in 1419,—"I, in common with many others *accustomed* to *legal evidence* and *correct* proofs, have the misfortune of not being completely convinced by this mode of stating facts. It would have been esteemed a particular favour, if the author of the above *indubitable assertions* had been so good as to have indicated any book *or record*, where it is said, or even insinuated, that Sir William Stewart of Jedworth ever accompanied Sir John Stewart of Darnley to France; or where it is mentioned that Sir Alan Stewart of Allanton *was of the party*," &c.—Ib. p. 65-6. I here put the same question to Mr. Innes, as far as proper proof goes, in reference to that of Robert the Second's *ante*-marriage.

‡ See Crawford's History of the University of Edinburgh from 1580 to 1646, p. 83.

‖ Father Hay, too, as oddly and gratuitously conjures up one "*Roger Mac-adam*, chaplain, *no doubt*, (he *curiously* adds) or curate to *Rowallan*," (Elizabeth Mure's father being of Rowallan,) who accordingly performed the ceremony "anno 1334." (See his Vindication, Edinburgh, 1722, p. 109,) as to which Andrew Stuart, though a strong Stewart partizan, remarks, that Hay "does not mention his authority," and that "his account is *certainly erroneous* both in his *facts* and his *reasoning*." (See Supplement to his Hist. of the Stewarts, p. 411.) Unless there was some hoax played upon the reverend gentleman, which might almost be implied in the *name* of the supposititious curate, *with reference* to *issue*, (the effect of marriage) he after the fashion of the old pendicle of the Master of Ravenswood, possibly thought he might exaggerate or fib a little for the good of the Stewarts, especially when—he being a papist—absolution was most likely to be expected.

not poets and *fanciests*, from the authentic document at any rate of the dispensation for the marriage of Robert and Elizabeth in 1347, that they had never been previously *(de facto)* married. The dispensation in the preamble *necessarily* recurs to, and accordingly fixes the nature and character of their *antecedent* connection, which was that of mere concubinage; for it there sets forth that they, *antecedently*, "DIU *cohabitantes* prolis utriusque *sexus multitudinem* procrearunt,"* that is clearly all along, during the subsistence of mere cohabitation or *concubinage*, *incestuous* of course—that was only removed by the former;—and this *without* the *slightest mention* of an *ante*-marriage, or more hallowed state of things either *de facto* or otherwise. If, on the contrary, the latter had any way obtained, the incident could not but have been stated, not only as more creditable to the parties, and relieving them from a deeper stigma, but *moreover*, to entitle them to a *new* and most favourable plea by Ecclesiastical law, however unknown it be to Mr. Innes, to be shortly explained in reference both to legal marriage and to legitimacy. In such circumstances, and utter silence here as to any *ante*-marriage in the dispensation, *that* never can be legally presumed, but *e contra*. I therefore maintain, that instead of it being "by no means proved or certain, that there was *not* a (*previous*) *formal marriage*" between Robert and Elizabeth—according to Mr. Innes,† there is here legal infallible proof of quite the reverse, *i. e.* of the perfect absence of any such engagements, by an *existing* and unimpeached document—from which the truth would inevitably transpire—and that any who runs may read.

Direct proof against such conceived ante-marriage, from the dispensation in 1347.

But farther still, even this is not all. The dispensation in 1347 for Robert and Elizabeth's marriage, is directed, in common form, for due execution,‡ to the Bishop of Glasgow, diocesan of the former, under the annexed condition of founding a chaplainry for the indulgence it granted.‖ And the noted charter of Robert in 1364, in implement of the condition (curiously discovered long before the dispensation, by Andrew Stewart in 1789), by which he mortifies certain lands for that purpose, has the inductive words, that apostolic letters, the mode through which

From the subsequent Stewart Charter in 1364.

* See Appendix No. I.

† See p. 4.

‡ All dispensations, of course, required to be executed, when arriving in this country.—See instance of Fleming, in 1508, p. 13.

‖ See Appendix No. I.

the Papal rescripts were enforced, had been *ex tenore* directed to the Bishop of Glasgow, " ut super *matrimonio* CONTRAHENDO inter *nos (Robert)* et quondam Elizabeth More dum ageret *in humanis*,* non obstante *impedimento* consanguinitatis et affinitatis *contractui matrimoniali* prædicto IMPEDIMENTUM PRÆSTANTE, auctoritate Apostolica dispensaret.†" The point is here again obviously clenched, for (1), the word " *contrahendo*," *to be* contracted thus, in the *future*, in reference to the marriage, shews that none had occurred even after the date of the dispensation, and that marriage behoved still to follow; while, (2), the closing part of the quotation further puts such supposed pre-engagement entirely out of question, establishing that it hitherto had been impeded and prevented by the same stumbling-block of the forbidden degrees, which—constituted an insurmountable bar. In these circumstances again, no other marriage than the subsequent one known can be presumed; nor can it be overlooked, that the above testimony is that of the principal party in the matter who could not possibly be misled. After this it is perhaps almost unnecessary—in the *absence*, too, of a single *contradictor*, to quote the concurring account of the cotemporary Fordun, a trustworthy historian, though *per se* conclusive, that Robert II, " *copulavit sibi* DE FACTO unam de filiabus Adæ de More militis, de qua genuit *filios et filias* EXTRA *matrimonium; quam* POSTEA *impetrata* dispensatione sedis Apostolicæ, in matrimonium *desponsavit canonicé*, in forma Ecclesie, anno scilicet MCCCXLIX."‡ It is indisputable, that the " *copulavit de facto* " denotes concubinage alone, by technical consistorial language, while the remainder of the passage fixes not only the birth of all the issue thereby, but that there had been no marriage till *after* the dispensation.

From the cotemporary contemporary authority of Fordun.

Mr. Innes, still delighting in gratuitous assumptions—at which rate all argument would be infinite, and there could be no conclusion in any matter—*imagines* further, that the *imagined* Stewart ante-marriage—not, however, in the best keeping with his *imagination* at the same time of its being " formal," was " uncanonical " and irregular, so that more required to follow. But if so, holding the Pope, or his rescripts, to be all powerful, as he unqualifiedly makes them, and summarily able to rescind the gene-

Gratuitous suppositions of Mr. Innes.

* She had predeceased.

† For full copy of the Charter, see Appendix No. II.

‡ Scotchren. Tom. II. Lib. XI. cap. XIII, p. 150, Goodall's Edit.

ral canons, all that would have been incumbent in the dispensation in 1347, would have been *de plano* de abrogate them for the nonce, as suited the individual case, without going into the details there, that would then be irrelevant—in which event, backed, as would seem too, by the law of nature, the marriage might start up all that Mr. Innes might wish, however anomalous and inconceivable to others.

He moreover evidently inculcates (though, I hinted before, he—as if wavering, does by no means state his propositions or argument with the requisite legal precision and definiteness, but rather vaguely) to account for the fatal silence or *vacuum* in the dispensation in regard to the *ante*-marriage, that because "uncanonical"—while he also styles it "formal,"—the dispensation was "*bound*" *not to assume* the *existence* of the same,—hence could never recognise or mention it, and therefore as must follow as a corollary here in the circumstances,—else there is no shade of an argument for Mr. Innes—passes it over as it was bound to do *sub silentio*,*—such previous act, that still, notwithstanding, might have happened, doubtless shocking the modesty, extreme sensitiveness and strict decorum of the high Pontiff and his conclave. But I am next constrained to reply—independently of the self cut-throat proposition in this final, we may add desperate plea of the express legal discountenance and disclaimer of the ideal ante-marriage by the highest authorities—thus removing it *again* as a legal make-weight from the field of controversy, which it should never have entered—that Mr. Innes is here in *flagranti errore*, and unaware of the old laws, and technical forms and practice in such emergency.

Pope, according to him, bound to assume that the ante-marriage did not exist, thus to rebut the silence of the dispensation in 1347.

If defective, any way informal, or putative the conceived *ante*-marriage, (withal still clung to), or uncanonical, the true remedy or procedure in the case was two-fold. Instead of not noticing it, or holding or *assuming* its *non-existence*, as it seems the Pope was *bound* to do,—a strange way certainly of dealing with a serious objection and antecedent flaw that fell ANTE OMNIA in the first instance, to be cured or removed—and thus virtually acknowledging its force,—the dispensation, on the other

Reply.

* I re-copy here his very words—"it is by no means proved or certain that there was not a formal marriage between the parties before the birth of those *children Robert and Elizabeth*,) *though* the Papal *dispensation* is *bound* to *assume* that a marriage, which *ex concessis* was *uncanonical did not exist*." See p. 4.

hand, *behoved imperatively*, openly and explicitly to *notice* and *advert* to such *putative marriage*, and then either to homologate and confirm the same, while the flaws and defects were specially and articulately condescended upon; or to order the parties in the matter, first to be separated and divorced, and then under a dispensation to celebrate a subsequent *just* and *unexceptionable* marriage. Previous to this, the parties and their issue, were technically said, in virtue of the preceding putative marriage, to be in *figura matrimonii*, which, notwithstanding its invalidity, *(alone)* still placed them in an advantageous situation, from the favour of law, even to the shadow of the act,* and entitled them to the above indulgences thereafter on the part of the Papal authorities, which *cured all*, and *rendered* both the marriage and the issue lawful.† We therefore now plainly see the importance of the attempt made by their champions to establish such putative marriage in the case of the Stewarts, but which unfortunately was there *wanting*, as must now be fully corroborated in the circumstances, by the utter silence and non-allusion to any such most important engagement in the Stewart dispensation in 1347, where, as I before contended, if it had obtained, it could not have been omitted, owing especially to the great benefit and service it would have proved to the parties. It was hence more allowable in Gordon and the Stewart partizans, to cling to the fond conceit of an *ante-marriage*, *before* the discovery of the above dispensation in 1789,—of which they could noways avail themselves,—that let out the negativing proof, than in those afterwards, including Mr. Innes, who had exclusively access thereto,—however they may have been unaware of its weight. I shall

Mr. Innes's notion quite redargued by practice.

* All this can be abundantly proved. Among others, Gordon says, in his Treatise de *Nuptiis Roberti Senescalli*, "Ortis autem *injusto (putativo)* matrimonio (quos *in figura matrimonii natos dicunt juris canonici interpretes*) ad *incolumitatem* status *tuendam subveniebat ecclesia*." (Ap. Goodall's Fordun, Vol. II. p. 9 of the Treatise.) That is, the Pope was admitted, a law to contribute his, aid to its corroborative—in the way to be explained in the text.

† Again, Gordon justly says, (ibid. p. 11,) in respect to children "*natis ex matrimonio* coito adversus canones (a *putative* marriage, they thus being in *figura matrimonii*) that the offspring "*sublato* radicitus *per dispensationem* vitio matrimonii, undiquaque *legitimi* habentur idque omnes fateri testatur." This is the very situation contemplated by Lord Hailes in reference to John Earl of Sutherland, and the daughter of Ross of Balnagown, related within the forbidden degrees, whose issue, as he adds, supposing they had married *de facto*, without a dispensation, could only have been legitimated by "an expensive interposition of Papal authority," *i. e.* through one *afterwards*. See p. 10.

next proceed to articulate *Scotch* authorities in support of my previous material propositions. And first, in respect to simple Papal confirmations of putative marriages.

Authorities in support of my propositions.

Previous to September 1322, Johanna Cunninghame, of the Diocese of Glasgow, being with'n the third forbidden degree of affinity to Adam More, was induced by a dispensation in their favour, produced by the Archdeacon of Glasgow, to marry, and have issue by him, but it so happened, as was *well* known to Adam, and, as must be presumed, to the Archdeacon, but not to poor Johanna, that the dispensation was a mere forgery, and "nullius *valoris seu efficiæ*." Here then was an *ante*-marriage (*de facto,*) plainly informal, incestuous, and null; while not only being so, but to the shame of a son of the Church as well as of Adam, this shocking and deplorable business, according to Mr. Innes, was utterly unfit for apostolic notice, and mention, should never equally with the marriage have been assumed or figured—and ought to have dyed the very cheeks of the Pope and Cardinals with vermilion. But alas, no such thing; to his horror again doubtless it must be added, that a subsequent valid Papal Rescript or dispensation of the above date, indispensable in the circumstances, actuated by no such squeamish feeling, goes publicly and callously into all these scandalous and *uncanonical* details, by which alone we know them, while it simply affords a remedy by allowing the parties, notwithstanding, "*in dicto matrimonio licité remanere.*"*—In other words, homologates and confirms it, with legitimation of issue, owing, however exceptionably, to their being *in* figura matrimonii," (putative,) and hence entitled to the benefit of the relative plea which elicited and warranted in law the true dispensation. The ignorance of the disgraced Johanna, no doubt, was to be attended to, but her husband had no exculpation whatever.

In like manner, before February 1430, William Mungubri (Mungumbri) and Helen Sympill had contracted a putative marriage, they being in the third forbidden degrees of affinity, attended with circumstances that made them be excommunicated; nevertheless a dispensation of the above date order the excommunication to be removed, the parties to be separated, for a time, but finally, "in matrimonio hujusmodi premissis non obstantibus

* For a full copy of this Dispensation from Rome, see Andrew Stuart's Supp. to Hist. of the House of Stewart, 428.

remanere libere et *licite*" with legitimation of issue.* They being again *in figura matrimonii*, were thus equally favoured.†

The instance of Gordon is certainly the best and most favourable of the kind. Sometime previous to 1428, " Alexander Seton, " *Domicellus*," and " Elizabeth de Gordon, filia quondam Ade de Gordon militis," the heiress of the Gordons, and both direct ancestors of the Ducal House of Gordon, (Setons is the male line,) the later Earls of Sutherland, and a host of nobility, had justly and honourably married with issue upon dispensation, owing to their being within the fourth degree of consanguinity " PUBLICE *juxta morem patrie.*"‡ It, however, accidentally transpired that there was a nearer forbidden propinquity between them in the third degree, there omitted, which induced them to fear the dispensation " *ex eo, fore invalidum*," and to apply for another, which accordingly followed, dated February 6th 1428, in the name of Jordan the grand Papal Penitentiary, whereby he enjoins (under apostolic authority) Henry Bishop of Saint Andrews to *decern* the preceding dispensation to be as valid " ac *si* in eadem, de distantia *tertii gradus* predicti *mentio facta foret*;" Thereafter, as is established by the original instrument reciting these facts, dated December 15, 1429,‖ the Bishop did confirm it to such effect, which made all things right. The issue here were born *in figura matrimonii* under circumstances otherwise quite solemn and valid.

To come to examples of the second class mentioned of Papal remedies, through dispensations to parties in the same situation, by divorce and re-marriage. Previous to 1439, James Stewart and Johanna Bureford, &c. in the third and fourth degrees of consanguinity and affinity had contracted a putative marriage, upon which, a dispensation in that year in their favour, to remove the impediment, first orders the parties to be mutually separated, and then " matrimonium invicem de *novo* libere contrahere " with the legitimation of issue. Not to be unnecessarily tedious, I may refer, in support of the same practice, to the dis-

* *Ibid*, p. 459.

† For another earlier instance of the kind in the case of John Steuart and Alicia Mure, in 1340, see latter Work, p. 431.

‡ This shews we were strict, by our peculiar Canon Law, in exacting publicity in the marriage ceremony, so different from the present, occasionally so loose and unwarranted.

‖ Gordon-charter chest.

pensations of Robert Gledstanis and Janet Turnbull, in 1420,—Archibald Douglas and Euphemia Graham, in 1425,—with others as well as the former, brought from Rome by Andrew Stewart, and published by him in the Supplement to his History of the House of Stewart.* A conclusion of bastardy is drawn also in the case of Stewart of Tracquair, in 1550, formerly alluded to, upon the ground that a divorce and re-marriage, in terms of a previous dispensation, in like manner, had not been complied with.

It seems impracticable, so far as I can see, to find a single instance of a previous putative marriage between parties, *not* specially mentioned in their subsequent dispensation, that was indeed warranted thereby, instead of passing sub *silentio* by the Pope and his conclave, as disdaining to admit the existence of the enormity—according to Mr. Innes's supposition or inference, which is hence, I repeat, clearly refuted. On the other hand, such is always stated, and pointedly referred to, and would have been also, had there been the asserted ante-marriage (*de facto*), in the Stewart instance. The *obligation* upon the part of the Pope, the *Servus Servorum Dei*, to "*assume*" that the latter "did not exist," (Mr. Innes's words) was, forsooth, a strange obligation, that would for ever legally have cut off the subvenient or homologatory redress that is above benignantly afforded. He did not so shut his ears, or feign to be bound to do so, but opened them largely to all such sinners; on the contrary, both presuming, nay actively interponing and co-operating in their behalf, consistent with rule. But it is unnecessary to say more to the quite gratuitous, unestablished, and moreover, refuted inferences of the learned gentleman, which appear to be the result of mere conjecture, without probing the matter; and hence his glaring error and mistakes.

Conclusion upon the Stewart case *in hoc statu.*

From what has now been set forth, therefore—so far as we have yet gone, we may conclude—the idea of the ante-marriage being quite *apocryphal*—while the dispensation of Robert II and Elizazeth Mure with us did not operate *retro*, or properly legitimate the *children* previously born,—that these in the ordinary course were illegitimate; which necessarily places the children of Robert II, by his *second* regular and unexceptionable *marriage* with Eupheme Ross, who were all born after *its* date, and hence, in legal marriage, in rather an advantageous situation. This

* See ps. 443, 450, 455, &c.

appears, however, subsequently misrepresented, to have been the pretext for the noted conspiracy of Walter Earl of Athol, who in consequence asserted his preferable right to the Crown,* as the heir-male by the second connection,† against James I, the heir-male of the first, that ended in the regretted murder of that Monarch, in order that Athol might take. But there nevertheless is still another legal *specialty* in the matter, that possibly, like Aaron's rod, may swallow up and destroy the baneful sting of the former from the incestuous bar, which remains to be discussed, in respect to Robert II and Elizabeth Mure. It further transpires from their dispensation, in 1347, though as yet unnoticed, that during the *long* period of their *incestuous* concubinage, (however unlikely,)‡ they had been "*ignorant*" of *this* its aggravated character, namely, from being related within the double forbidden degrees,‖ while it is unquestionable, that with us such ignorance, with *bona fides*, of parties who had honestly celebrated a regular or formal marriage—not a private or clandestine one—in *facie ecclesiæ*—albeit the fact, then unknown, afterwards emerged, of its being of an incestuous nature, from forbidden consanguinity as above, and hence null; *yet* saved the legitimacy of the offspring in law, though not the marriage. To save, or legally sustain the marriage, the right of the Pope was admitted regularly to intervene and act, as in the analogous cases of putative *ante*-marriages cited before.§ Of this favourable law, in reference to the issue, I have added an example below,¶ and must refer my readers in farther illustration

New specialty from *ignorantia* in the Dispensation in 1347.

* This can be established by historical evidence, to which I alluded in former works. It cannot be disputed, that there was always a strong tradition and impression of a flaw in the Stewart succession, attaching to Robert III.

† The heir-female of the same, through David Earl of Stratharne, Athol's *eldest full* brother, was then Malise Earl of Monteith, through whom this illustrious representation now vests, by direct descent, in the present Robert Barclay Allardice, Esq. of Urie. The succession to the Crown of Scotland was, after the Salick rule, in the first instance, subsequent to Act 1373.

‡ Or *non probabilis*, to use the technical terms in law, rebutting the plea of ignorance when made.

‖ See Dispensation, Appendix No. I.

§ See ps. 26-7, *et seq.*

¶ The Judge Ordinaries of Saint Andrews, on February 19, 1542, annulled the marriage solemnized in *facie Ecclesiæ*, between James Mowbray, burgess of Edinburgh, and Margaret Smyth, at the instance of the former, on the ground o f affinity, from Margaret previously having been carnally known by Alexander Napier, who was in the fourth degree of consanguinity to James, *but* decreed the *issue* "inter eosdem susceptos

Case of *ignorantia* in a putative marriage saving the legitimacy of the issue.

and corroboration of it, to another performance.* So far as "ignorance" applies, there may be reciprocity in both instances—*sed alia alii*;—and the last is not the EXACT case of the Stewarts; for there the children were not born of a marriage regularly celebrated in *facie ecclesiæ*, or even any way in *figura matrimonii*, as shewn, but solely in incestuous concubinage previous to such. Here there is another specialty again in the case in question, so fertile in legal points, and hence so peculiarly interesting to Lawyers, by either fixing or tending to illustrate them in discussion—even those comprised in the weighty modern processes of Riddell *v.* Brymer in 1811†—and Ker v. Martin in 1840,‡ nay, in that of Macadam in 1806,‖ &c. &c. instead of being, as Mr. Innes excepts, *rather* invidiously and detractingly, an enquiry that an *Antiquary might* despise,§ though he indeed himself forms an antidote to the exception by

But a specialty here again, and unfavourable in the Stewart case, so fertile in legal points.

et procreatos LEGITIMOS *fore*;"—why? "*ipso Jacobo hujusmodi impedimentum tempore* contractus dicti *pretensi matrimonii penitus* IGNORANTE."—Register of the Official of Saint Andrews within Lothian.

* See Peer. and Consist. Law, p. 453, *et seq.*

† This involved *ignorantia and bona fides* on the part of a husband, in respect of his marriage to a deceased lady, the wife of *another* who had been *in mala fide*, and where there was a child. Much discussion ensued, and the Bench were divided in their decision, but the death of the child stopt further procedure.

‡ This was a most important case of subsequent marriage and legitimacy that may happen any day, in which that of Robert II. and Elizabeth Mure was pointedly founded upon, and discussed, upon both sides, however trivial, as would follow from Mr. Innes. For a report of it, see my last Work on Peerage and Consistorial Law, p. 520.

‖ Another much agitated case of subsequent marriage, involving the consideration of the *oldest* authorities.

§ See p. 4. He also says *loco citato*, (ib.) in the preface to his edition of the Chartulary of Glasgow, that "it was reserved for the ingenuity of later writers (in Stewart case) to raise other objections *after* the *whole disputes* have fortunately taken their *proper* rank in *mere subjects* of antiquarian *curiosity*." Few lawyers, I suspect, will go into such notion (besides so ill-founded) in so comprehensive and weighty a matter, rather characteristic of those, who not being accurate or deep legal Antiquaries themselves, instead of liberally encouraging free and exact discussion and enquiry elsewhere—the only way in which innumerable Scotch points can be fixed or cleared—would indolently recline on former prejudices, and be content with superficial attainments and deductions. By my own experience and observation, from trivial antiquarian discussion, most material results and information have unexpectedly followed, and nowhere are they so much wanted, nay, imperatively called for, as in the relative Scotch department. The more *hypercritical* sifting there, the better. Judging by Mr. Innes's mode of argumenting as exhibited, he is neither definite in exposition (perhaps dealing in inuendo as might be thought by the above quotations) direct—or at all anxious about author ities—inasmuch a he never gives them. It might be more relevantly urged, that "it was reserved for" him to introduce latterly, so strange, so novel a course in controversy, discountenanced by Lord Hailes (whom

canvasing—with what success *will* be seen—nay, in being *captivated* by others of the kind, thought by some of a far inferior grade. In fact the Stewart case, taken with the points raised and comments thereon, and necessary illustrations, has tended, and I conceive may still, to ripen our consistorial law, *no unimportant* branch of the profession, which is especially desirable; for Lord Kames has justly remarked, that "few branches of our law are handled with less precision than what particulars are necessary to constitute marriage,"* and that the subject (involving legitimation by subsequent marriage) is involved in "darkness and confusion." More regarding the latter, will be found in the Stewart controversy than elsewhere.

Stewart Case involves many points of law.

In the previous circumstances, let us see what legal Commentators and Canonists think of the matter, to whom we *may* appeal in *absence*, so far as I yet know of *exact* Scotch precedent. Ludovicus de Sardis thus actually puts, and answers the present Stewart point. "Habui filios ex mihi conjuncta *quarto* gradu,† me *ignorante* impedimentum eam in *concubinam* habui; nunc *sublato impedimento, (by dispensation,)* eam in *uxorem accipio* an *filii ante* nati *legitimantur*—videtur quod non, quia mero jure, non potuit esse uxor, *tempore* quo nati sunt, quod requiritur, ut supra, de legitimatione per *verum* matrimonium.‡" Such opinion Sardis holds, though he notices a contrary inference that might, he speculates, be drawn from "*glossa extra qui filii sunt legitimi, caput tanta,—ad caput de tenore, &c.*—ubi dicitur quod si fuerit defectus in matrimonio ignorantia excusat."‖ But with submission, this is quite a different question, that of children born *bona fide*, of a regular marriage *(de facto)* whose legitimacy accordingly is saved, and *not* in a state of concubinage. Even by the Canon law and ours, *in ignorantia*, a clandestine *bona fide marriage*, when dissolved upon the ground of relationship, imparted *no such*

Opinion of Canonists upon the Stewart Case.

however he does not seem to comprehend) and all great native oracles. No legal propositions—far less opposing suggestions or objections, should ever be publicly risked without being explicit, and articulately backed BY authorities; at least in every controversy in which I have been engaged, I have observed this rule (like most others) as much as possible.

* Elucidat. Edit. 1777. p. 29. This Judge lived till 1782.

† That in which Robert II was related to Elizabeth Mure.

‡ True legitimation per subsequens matrimonium between a *solutum* et *solutam* that he had been discussing.

‖ Tractat. Tractat. De nat. Lib. Vol. VIII, P. II, p. 37.

benefit* to issue who were *spurious*, which seems a stronger case than the latter, and has here often been opposed to it. To the previous purport, Pirhing, a distinguished Professor in the University of Dillingen, inculcates, that "quando *tempore conceptionis impedimentum* existit inter parentes dirimens matrimoniun, etiamsi ab altero eorum *ignoratur* prolem tamen inde natam *non* fieri *legitimum* propter matrimonium subsequens *ablato impedimento*, (such as *by dispensation*.† I may appeal to my last work, from which what precedes is chiefly taken, for some further illustration here.‡ Another exception against the Stewarts may be, that favour in law is not shewn "danti operam *rei illicitæ*," and that to him "*imputantur omnia* quæ sequuntur præter *voluntatem suam*," that it is, whatever prejudice or untoward infliction may unintentionally accrue to him, or his issue, by an immoral or incestuous act, as in the instance of the former, *quia versans in illicito*.‖

On the other hand, it has been maintained by lawyers, with the aid of *favor prolis*—namely, just or equitable consideration for the children,—though the law be neither inclined "*damnatum, (i.e. incestuosum,)* complexum fovere;" that the plea of ignorance, such as brought out in the Stewart Dispensation in 1347, might still make incestuous issue in the Stewart predicament merely *natural* —that is not *spurious*, as they strictly were,—but constructively the issue of a *solutus* and *soluta*, and hence of course, capable of being legitimated *per subsequens matrimonium* upon dispensation.§

Though my attention has always been awake to the point, yet I have not discovered any old practical precedent or case that could precisely illustrate that of Robert II. and Elizabeth Mure; and it may be a consideration, (1.) whether the exception of *ignorantia*, obtained with us in their time, and (2.) whether, as

* This can be fully proved also by the law of Scotland,—in support of which, see my last work on Peerage and Consistorial Law, pp. 475-6. Even Father Hay, the Stewart partizan, is eager to prove the fact. See his "*vindication* of Elizabeth Mure from the *imputation* of being a *concubine*," p. 108. We are here insensibly reminded of the attempt of Nel Gwin's attendant to vindicate her, in like manner a *chere amie* of royalty, and the *thanks* he received,—both in fact were equally officious and useless acts, for which Elizabeth doubtless had been as grateful.

† For the preceding excerpts from Sardis and Pirhing, see Tractat Tractat, Vol. VIII, P. II. p. 137; and Pirhing, in *Jus Canon*, Edit. 1722, Lib. IV, § V, p. 34.

‡ Peerage and Consistorial Law, ps. 511-517.

‖ *Ibid.* p. 514.

§ The principle here seems to be recognised by *Pontius*, *Lib.* 7, *Cap.* I, § 2, *n* 13; *Gabriel*, *Lib.* 6, *de legitim conclusion* 1, *n* 4-5, &c. with others.

might be inferred from the argument in the Tracquair case in 1550, whereby our doctrine of legitimation by subsequent marriage between incestuous parties was excluded in a certain event, by the *inviolable practice and custom* of the country,* *that* did not also modify the exception some way or other with us, either favourably, or unfavourably. From the tradition *and impressions of the country*, handed down, (if they are to be listened to), which seem against the legitimacy, we *might* be led to infer unfavourably. Possible specialty with us.

This is all I can safely offer upon the curious question of the legitimacy of the Stewarts—only, however, adding—what must ever be kept in view—that the law in such instances, when there is doubt or *conflictio juris*, as possibly in the present, always leans to the side of legitimacy, so that, doubt here, contrary to the ordinary doctrine, may prove salvation; and with these remarks I shall leave the merits of the Stewart case, that may now perhaps be better appreciated, to the discernment and judgment of my readers. But this at any rate seems indisputable from all I have shewn—including our own practice, the foreign, together with Gordon's attestation, that *without* the special plea of *ignorantia* (admitted in the *relevant* instances, in every country but England,) the Stewarts were confessedly illegitimate at common law, and it is only thereby that their legitimacy in like manner may be saved. We therefore see how suicidal Crawford was in his argument and exposition in behalf of the Stewarts, when he made the Stewart parties *ab initio*, *fully aware*, and not ignorant as they behoved, of the incestuous nature of their connection.† Conclusion.

Moreover, this *most important* plea or exception, apparently not hitherto sufficiently attended to, may *chance* still to act in the same critical way, nay more salutarily in the case of many noble Scotch families and successions.

Dissoluteness great in Scotland before the Reformation, in no manner more displayed itself than in the unlicenced intercourse between the sexes, which was certainly encreased by the forbidden degrees, comprising a great range of connections, (so much so, that there came to be but few high families who were not thereby barred from marriage at common law,)‡ combined with the neces- Plea of ignorantia most important, and falls to be sustained.

* See p. 15. † See ps. 20—1.

‡ This is strikingly indicated by the dispensation in 1355, for the second marriage of Robert II with Eupheme Ross, who were in the fourth degree of consanguinity, and third of affinity, (subsequent to which and this marriage, all their issue were born,)

sity of obtaining dispensations for marriage to obviate the objections, that were often long in arriving from Rome; for in these circumstances, parties enamoured of each other, unable to brook the requisite cruel delay, either nevertheless *de facto* married, or dealt in fornication or concubinage. After the arrival of the dispensation, their love having cooled, they frequently jilted each other, "ad *altera vota* convolantes"—while they even made their unlawful intercourse a further handle, good as it was, for the jactitation of the putative marriage, by continuing which they incurred excommunication. Such separations, with undue divorces and re-marriages, became so frequent, as according to Major, to become a national reproach.* It was impossible too, even for parties who *bona fide* regularly married, owing to the extent still of the forbidden degrees, properly to know whether they were really lawfully married, or not living in incestuous concubinage. There was hence a great state of "ignorance" and uncertainty in reference to the subsistence and validity of the matrimonial connection,—every marriage withal, being liable at once to be set aside, upon the emerging of a scandalous discovery or fabrication of *copula* (even sometimes voluntary shameless *admissions*,) of one of the parties with a kinsman of another, which made the *affinal* bar, as effectual a flaw in itself as the *consanguinean*.†

Especially from the peculiar structure of society before the Reformation.

where it is stated, that *vix valeat* mulierem *aliquam* nobilem sibi parem, quæ aliquo consanguinitatis vel affinitatis gradu, eidem non attineat." Andrew Stuart's Supp. to House of Stewart, pp. 420–1. Marriages were then more select, and what was called disparagement, avoided.

* Major, who figured before 1521 and afterwards, says, "*Scoti* hac nostra tempestate nimis leviter *divortium procreant*, et plerique laici ad salutem anime existimant, *dummodo* in foro externo *falsorum testium* testimonio, divortium celebratur, et sic alias mulieres *quas conjuges* putant in adulterio contrectant."—Hist. Edit. 1521, p. 112. Here perjury and falsehood were thrown into the scale.

Singular clauses in settlements of our higher orders formerly.

† It was indeed rather difficult, owing to the reasons in the text, to hold the eels of nobility by the tail. George second Earl of Huntly, after jilting the Princess Annabella, daughter of James I, and Elizabeth Dunbar, Countess of Moray in her own right, both of whom he trepanned to his embraces, and *divorced*, thereupon made proffers of marriage to Elizabeth Hay, sister of Nicholas Earl of Errol; but he properly was disposed to use all caution, and accordingly, Earl George, by a relative contract, 12th of May 1476, became bound "never" to "presume til hafe *actual delen* wyt the said Elizabet, nether be *slight* nor myght, nor any other manner, on to the tyme it be sene to the said Lord Nichol, and her other tender friends, that I may hafe the saide Elizabeth to my wife lauchfully." The above is proved by original deeds in the Gordon and Errol charter-chests. The recklessness and fickleness of marriage contractors, certainly then introduced *odd* clauses into marriage contracts. Take another instance. By a contract registered in 1555, betwixt Robert Menzies of that

And such being the case, in what situation, it may be asked, were the *numerous issue* in these respective instances? Why, in the ordinary course, they would all be spurious and bastards, had it not been for the healing, in a great measure, and indispensable plea or exception of *ignorantia*, which imparted legitimacy to many in putative marriages, however, not saving the marriage that required again for its support—if the parties were so inclined—to be homologated and confirmed at Rome. When further, in connection with the above, we consider the striking fact, of *many* of the entails of our first families, both of honours and estates, having *very comprehensive remainders*, including branches not *nominatim*, but simply under the classification of "heirs male" or "heirs whatsoever," who came off previous to the Reformation, nay long before, whose ancestors were of course of the *description* referred to, and whose *status* and *legitimacy should* hence be *fixed* by *cotemporary* law, including *ignorantia*, the most *baneful* consequences, *extremest anomalies*, and *inextricable perplexities*, would ensue, if, as was done by half of our Bench in the case of Riddell against Brymer, in 1811,* upon metaphysical vague no-

Ilk, (the representative of the ancient Norman family of Menzies, or rather *Meyneris*, of the same stock as Manners in England), and John Earl of Athol, it is agreed that James Menzies, his grandson, shall marry Barbara Stewart, the Earl's sister; and while the Earl thereby renounces the patronage of the Kirk of Weme to Robert, Barbara is to have a tocher of a thousand pounds. The marriage is to be in face of holy Kirk, upon a *dispensation* that is to be got; but if James refuse to marry her, *or* if married, raise a *divorce*, (evidently upon the ground of canonical impediments, his passion being gratified and sated), he is to restore her tocher, "togidder wyt ye soume of ane *uyer thousand* pounds for *violation* of ye said *Barbara's virginitie*," who is then, being also jilted, to be left with the issue to her fate.—(Record of Bonds and Obligations.) Her husband, however, did *not* so deport himself. The reformer will chuckle at this, and plume himself on his more *delicate* and correct æra. But stop a little, let us look at the Testament of James first Lord Balmerinoch, 27th of April 1612, who, after stating that he had been drawn out of the *troubles* in which he had been involved, (heavy indeed), leaves his three daughters, Margaret, Barbara, and Marjory, portions of 10,000 merks each; but they are to be restricted if they "*abuse* themselves in *harlotry*."—(Elphinstone Charter Chest.)

* See my last work on Peerage and Consistorial Law, in allusion to this case, that turned exclusively upon *ignorantia* and *bona fides*, ps. 464—468-9. One half of the Bench, however, did support the exception of *bona fides et ignorantia*, but the death of the issue in question of the putative marriage sisted further procedure. I humbly conceive it is especially soothing to find that these great authorities, Ex-President Hope, Lord Glenlee, both still alive, and the late Lord Meadowbank, were of the number, while the latter has transmitted that President Blair had even, with less scruple, been for *bona fides* and *ignorantia*. See Mr. Bell's report of the case.

tions,—or by Mr. Innes's *natural law*—this plea of ignorance, certainly applicable to the same, be recklessly and most unauthorizedly, I may add, scouted and rejected. While cases involving it among such parties may easily occur,* it cannot be denied that the plea in question, (which can alone save the legitimacy of the Stewarts, however *ex necessitate*, in 1811, *bastardized* by half of the *Bench alluded* to), was a cardinal and relevant one in our law and practice, besides common to every other country except England.

Right of the Stewarts to the Crown of Scotland fixed independent of their birth by Act 1373.

It is almost superfluous to repeat what I stated in a former Performance, that the question of the Stewart legitimacy is quite independent of, and can in no respect affect or impair the subsequent right of the Stewarts to the Crown, in the person of Robert III, the eldest son of Robert II, by Elizabeth Mure, and their descendants,—the right being solemnly fixed in the former *nominatim*, during the lifetime of his father, by the Parliamentary settlement of the Crown in 1373, with limitation to him and his *full* brothers, *nominatim* also in due order, and the heirs-*male* of their bodies in the first instance. They here took quite under a singular title, without the necessity of their birth being canvassed, which hence became fully irrelevant.† Failing the male issue of Robert II. and Elizabeth, by the settlement likewise, those by his second wife, *Euphemia Ross*, next take in like manner,‡ failing all whom heirs *whatsoever* (of the *last* heir-male).‖ It was under the latter remainder Queen Mary justly succeeded in 1542,

* In the modern case, involving honours and estates, the Duke of Roxburgh against General Ker, in 1822, in respect to the male descent *qua* heir under an entail, of a remote Roxburgh Cadet, at the distance of more than three centuries and a-half, it was not denied that our *old* law, before the Reformation, fell to rule, and pointed and innumerable references were made to it, including all that bore upon marriage, legitimacy, *ignorantia*, *bona fides*, &c. &c.

† Consist. and Peerage Law, *ut sup.* p. 518.

‡ Bishop Lesley, though the adherent of Queen Mary, strikingly in his History calls this *postponement* of the Ross line to the Mure "*exhæredatio*,"—and adds that it "*magni odii inter liberos* fomite subministrato, *necis* Jacobi primi ab *Eufemia (Ross) filio natu maximo*, editæ *causa fuit*."—Edit. 1575, p. 249. This is certainly singular, and easily explainable by the illegitimacy of Robert III, notwithstanding the old glaring error as to the order of Robert the Second's marriages, &c.

‖ For a full copy of the settlement, see Robertson's Index to the Records, Append. p. 14. There had also been a previous Act of Parliament, in 1371, (ib. p. 10–11.) settling the Crown *nominatim* upon Robert III, whose right on all hands was thus unexceptionably fixed. He is called John in both instances; his name thereafter being changed to *Robert*.

the SOLE heir-male, after her father, John Duke of Albany, called as above, who would otherwise have excluded the Queen, having in 1536, predeceased without issue.*

It is very true, in accordance with what Father Hay says, (see p. 22,) that a private or clandestine marriage would have bastardized issue, whose parents were within the forbidden degrees, (in *any* event in the ordinary course,) but still the issue being in *figura matrimonii*, and *not* in *concubinage*, the marriage *might* on application *have been* homologated and confirmed by the Pope, agreeably to rule,—who then must not be allowed, according to the *Bull* or *Canon of Mr. Innes*, to be "bound to assume," (strange and irrelevant obligation indeed,) that "it did not exist." He cannot be held to be so very blind and obtuse as *Mr. Innes*—however a reformist by *his* canon, would make him. But the *after* consideration in the Stewart instance can but ill justify the pernicious advice which *Mr. Crawford's* confessor, at his suggestion, puts into the head of Robert, (see again p. 21,) as independent of the canonical iniquity, saving his reverence, Robert and Elizabeth might have predeceased such Papal confirmation, when the issue would have been irretrievably illegitimate. The preceding, however, was not their case, that simply resolved into one of incestuous concubinage, where ignorance *must* intervene, if the legitimacy of the issue is to be at all rescued at common law. In the modern case alluded to of Brymer against Riddell, in 1811, the fact of the putative marriage that produced the child *in ignorantia*, being *public*, while the first forming the impediment was merely clandestine, according to our *original* practice, and understood notions elsewhere, must always strongly tell in favour of the child's legitimacy. It is to be observed, notwithstanding the strange hypothetical doctrine unwarrantably urged to the contrary effect by a certain Judge on the above legal occasion,† now deceased, that the ignorance or *bona fides* of *only one* of the parents, by technical received practice, in such emergency, makes the child lawful.

Observation upon a remark of Father Hay, as to clandestine marriages.

* This is proved by the obituary of the Chapel of Vic le Comte, in France, that existed before the Revolution, intimating that "Prince Jean Duc d'Albanie *Comte* de *Boulogne et d'Auvergne*," (the latter his French titles,) died June 2d 1536, at his castle of Mirefleur, and was buried in the chapel of his palace of Vic le Comte.

† See Peerage and Consistorial Law, p. 464.

Stewartiana.

II.—REMARKABLE ERROR OF MR. INNES IN RESPECT TO LORD HAILES, AS CONNECTED WITH A FRUITLESS ATTEMPT IN 1771 TO RECOVER STEWART PAPERS.—ALSO IN RESPECT TO THE FOURTH DEGREE OF CONSANGUINITY IN THE CASE OF ROBERT II AND ELIZABETH MURE, WITH NOTICES OF MARGARET STEWART, PUTATIVE WIFE OF JOHN LORD FLEMING IN 1508,—JANET STEWART, LADY FLEMING IN 1523, HER CURIOUS LIAISON WITH HENRY II OF FRANCE—THEIR SON HENRY DE VALOIS, &c.—QUEEN MARY, HER BIRTH, &c.

No legal antiquary was upon the whole more cautiously accurate, deliberate, and matured in his views when at last stated, than Lord Hailes. He is the very model to adopt in the field of Scotch Antiquities, that originally abounded in all kinds of weeds, flinty obstacles and obstructions, which were, in no small degree, extirpated and removed by him. And without the constant use of such critical pruning knife as his Lordship's, the former rank, unwholesome vegetation, will infallibly return there as well as things in a great measure to their original chaos,—withal, if we be tempted to adopt the *bold* project announced in a new publication,* to substitute "tradition" for strict and proper evidence in the statements and accounts of Scotch families, with which it seems we are to be favoured. To all who know the peculiar state of our records, different from those of most European countries, and of our pedigrees, where there is so much fable and misconception based upon secondary *contradictory* evidence again, of all kinds—too often their support—this will never do; nay, it will

Lord Hailes.

* See Quarterly Review for May 1843, p. 188, which justly describes the attempt as a *bold* assertion of the claims of tradition.

be confusion worse confounded, with the re-recurrence of palpable falsities and anomalies, that might otherwise be *else* eschewed, and therefore, I hope this standard and criterion will not be adopted.

Doctor Johnson, with a just sneer, has said "*much* faith is due to tradition," which should only be cautiously admitted as a kind of adminicle, in certain peculiar cases of circumstantial evidence, but never in the existence of what is strict and direct. Owing to the above reasons assigned, I have always had a veneration for Lord Hailes, and so far lauded him as a model and pattern. Yet to my surprize, I find Mr. Innes (as to whose qualifications and success in the same Antiquarian department we may yet have an opportunity of judging) in his late Preface to the Chartulary of Glasgow, in effect charging Lord Hailes with inefficiency, improvidence or incaution, in a memorable endeavour, it seems, he prominently made to recover, or obtain information as to certain important old Scotch documents in a foreign quarter, from which, alas, according to Mr. Innes, we may have been thereby unfortunately debarred. He informs us, that "in 1771, the *curators* of the Advocates' Library, *with Mr. Dalrymple, afterwards* LORD HAILES, *at their* head, made an *ineffectual* endeavour to obtain precise information *of the treasures of the* Scots College, (at Paris.) They *incautiously* asked too much:" The result of which unfortunate and ill-timed avidity on the part of the curators, including Mr. Dalrymple or Lord Hailes, was, as also follows from Mr. Innes's Preface to the Chartulary, that they were completely baulked in their application, and unsuccessful.*

Strange and palpable error of Mr. Innes, in regard to Lord Hailes, to the unmerited prejudice of his Lordship.

In this manner, for the first time, we find Lord Hailes obstructing by his imprudence the path to important antiquarian knowledge, instead of, as before, opening and expanding it. But what shall we say when the charge turns out to be as unfounded, as it is rashly made? Lord Hailes *had nothing whatever to do in the matter*;—the Mr. Dalrymple mentioned, was quite a different person, as indeed Mr. Innes would have at once seen, had he considered for a moment, or made any examination into the point. Lord Hailes, instead of being only then Mr. Dalrymple, was actually a judge under that *title in* 1771, *the time adverted* to, having even been raised to the Bench so far back as the pre-

* Chartulary *ut sup.* Preface, ps. v. vi.

vious 1766, which notoriously disabled him from acting as he is thus represented, in the capacity of a curator of the Advocates' Library. Nay, as early as the 24th of February 1751, he ceased to be Mr. Dalrymple, by the death of his father, Sir James Dalrymple, of Hailes, Baronet, when he succeeded to his Baronetcy, and became Sir David Dalrymple of Hailes.*

The error on the part of Mr. Innes is the more strange and unaccountable, because in the Preface to the *Analecta Scotica*† the valuable contribution, among others, of my learned brother Mr. Maidment, advocate, and to which the former explicitly refers,‡ as the source of his information in regard to the interesting negotiations of the curators with the Scotch College, for their valuable stores, it is distinctly corrected. Mr. Maidment‖ at one time was led to think that the Mr. Dalrymple in question (*also David*) was Lord Hailes; but his acuteness soon shewed him the contrary, which elicited his pointed corrections, accordingly, both in his preface and index, with the unmasking *the Dalrymple in fault*.§ He, however, never represented Lord Hailes as only having obtained that rank, or mounted the Bench "*afterwards*," (*i. e. subsequent to* 1771) ;—this *improvement* in the matter, as we have seen, was curiously, by some fatality, reserved for Mr. Innes. We have thus a curious verification of the adage, that a story never loses by the telling, as illustrated elsewhere, by the episode of the "black crow," and otherwise.

The individuality of the *real* Mr. Dalrymple,—the real *Sosia*, —or hasty and injudicious curator in 1771, will now be shewn. It is proved by the records and minutes of the Faculty of Advocates,—in perfect unison with Mr. Maidment's correction,¶— that he was the son of Hugh Dalrymple, Lord Drummore, likewise a Judge, or Lord of Session,—that he passed Advocate in

* All the above is proved by the Records of the College of Justice, and Faculty of Advocates, with concurring cotemporary accounts.

† See Vol. I, ps. 10-13. Edin. T. G. Stevenson, 1834. 8vo.

‡ See Pref. to Chartulary of Glasgow, p. vi.

‖ Not only in peerage matters, (as I had occasion to shew in a late performance,) but in every department of Scotch Antiquities, Mr. Maidment's exertions are incessant and beneficial, indeed, as partly here evident.

§ See *Analecta Scotica*, prefatory "Notice."

¶ See *Analecta Scotica, ut sup.* p. iv.

1743,—and eventually himself became a Judge of the same Court under the title of Lord Westhall, in 1777. I am happy it has thus been in my power to defend and vindicate Lord Hailes, wholly innocent, from so rash and unseemly a charge,—as I certainly farther would have been, from any thing that might in the least degree detract from so excellent and meritorious a character. I confess also, I have been one of those who think that accuracy in the editing of MSS. of any kind, is especially incumbent, nay imperative, to the exclusion of all haste, carelessness, and superficiality, and certainly mistaking, as above, one important person for another,—the less warranted too at a recent juncture,—because, independent of other considerations, this may both mislead the rising generation, who ought to be imbued with the best and most accurate state of things, and have obviously an unjust and injurious effect in possibly creating in the minds of posterity, who may not have the best means of judging, undue prejudices against those so mistaken, or misrepresented. I have been induced with regret, to notice the error in question, in regard to valuable papers, certainly once in the Scotch College at Paris, that might have further illustrated the fate and history of the Stewarts, and thus naturally falling within the scope of my Stewartiana.

Such errors and all inadvertencies in editing MSS. to be shunned.

There is another strange and rather amusing anomaly in Mr. Innes, that I find I must likewise, from similar motives in part, advert to, in his Stewart "suggestions,"—though rather unwilling to add to the number of his mistakes and misapprehensions, which I regret, will be quite enough when we arrive at the goal of this performance. Although presumedly vilipending, and viewing the prohibited degrees as "shadowy," and withal against the law of nature, from whence they ought to receive no favour or countenance, if not to be summarily discarded, he, notwithstanding, has been the *first gratuitously* to *extend*, nay to outstretch them, beyond all due and received limits. He has actually made them in his said "suggestions," or objections to me, extend to, and comprehend *under* the *fourth degree* of consanguinity, "the GREAT *grand-children* of cousins-german."*

Flagrant legal error and mistake of Mr. Innes, in the previous case of Robert II. and Elizabeth Mure.

* He alludes here to the connexion of *parties* related *within the* FOURTH *degree* of consanguinity, "which, (*he adds,*) *might be said*, if *they* were the *great grand-children* of *consins german*," (see p. 4.) The identical words quoted are his.

This is indeed new intelligence. But by the canon law, which was *the rule*, the authorities were not so severe,—they here stopt at *grand-children* only of cousins-german; so that Mr. Innes has thus again taken a rash leap over the legal barriers, and foundered on the other side, all unconscious of his mistake. We shall, however, attempt to undeceive, and kindly rescue him from the treacherous ground upon which he has been precipitated and swamped. By the canon law, (different from the civil,) the degrees of forbidden relationship were computed downwards, but in one line. A brother and sister were in the first degree—a cousin-german in the second—the children of the cousin-german in the third —and the grand-children of the cousin-german *in* the *fourth*, *when* the prohibited degrees *were* legally SPENT *and* CEASED, without being protracted, to the *fifth* degree, that is, to *great* grand-children of cousins-german, as the learned gentleman has represented. This is established, as he will find, by our official and consistorial procedure and dispensations, as well as by canonists. The point that in the canon law occasioned doubt or contrariety of opinion at one time was, whether the parent or *common ancestor* was to be *included* and taken into calculation, as forming the *first* degree of relationship or "*primus gradus*," which would have made things still worse for Mr. Innes. But the negative of this came to be properly resolved, and the computation held to *begin* only, under the *first* description, *with brothers* and *sisters*, and so on—all being easy and self-evident after that *ascertained terminus a quo;* and which must on all hands be admitted with us, as such, from the evidence subjoined, was indisputably our received practice.*

* Sentence of the Official of Saint Andrews within Lothian, October 26, 1536, finding the "sponsalia de futuro, carnali copula subsecuta," between Beatrix Raneton Lady Hirdmanston, and William Crichton of Drylaw, to be null and void from the beginning, because previously, "dicta Beatrix carnaliter cognita fuit per quondam Jacobum Crechton de Cranston-riddall capitaneum castri de Edinburgh *fratrem* carnalem dicti Willielmi attingentem dicto Jacobo *in primo*, et *primo gradu* consanguinitatis de *jure* prohibitis, et ex consequenti dicte barbare in *eodem* gradu *affinitatis*." These parties, therefore, are divorced a *vinculo*, Beatrix, owing to such aggravated iniquity on *her* part, being further adjudged "absque spe conjugii in *futurum* remanere."

Sentence by the same Judicatory, September 7th 1527, decerning the pretended marriage, solemnized *in facie Ecclesiæ*, between John Wilson and Meriot Crumby, to be null from the beginning, "eo quod carnaliter cognovit ejus *sororem* uterinam" (Meriots), which made, as there stated, the former to be in the *first* and *first* degrees of affinity.

Divorce a vinculo pronounced by the same Judicatory, June 6, 1537, in the case of John Smith and Agnes Durie, because John had previously carnally known Margaret

We were by no means here singular. The method of computing degrees in England was also by the canon law as with us, so that an instance derived therefrom is relevant. Now, by looking into Blackstone, it will be seen from an illustration he gives, in the case of the mutual relationship between Richard III, the *Prepositus*, and Henry VII, deriving from Edward III. that the latter, the *great grand-child* of John Earl of Somerset, the *cousin-german* of Richard Earl of Cambridge, Richard the Third's grandfather, was not in the fourth, as Mr. Innes would make him, but in the *fifth* degree of relationship to the said Richard III.

Blackstone well adds above, that Henry VII being, in that instance, " the farthest removed from the common stock, (Edward III,) gives the denomination to the degree of kindred in the Canon and Municipal Law," that is of the *fifth* in relationship.*

Though in a manner superfluous, I shall add too, a practical example of what was considered the *fourth* degree of *consanguinity* in Scotland. It was objected, in the curious consistorial case of Stewart of Tracquair in 1550, formerly alluded to,† that William Stewart of Tracquair, who succeeded by the death of James Stewart, his *father*, killed at Flodden in 1513, was *within that* degree of forbidden propinquity (in respect of a third party) because lineally descended of " ‡ Stewart," father of *James* Stewart or *Lord Jakké, (his soubriquet)* first Earl of Buchan; and here is the way in which the matter is legally set forth and explained, because " *imprimis*," the " Stewart, *pater* Jacobi *Comitis de Buchan*" was " *unus*" *(gradus)* from the common ancestor; the said *comes* vocatus *Lord Jakké*—ejus *filius*—SECUNDUS;

Durie, " *neptem* ex fratre dicte Agnetis genitam," which Agnes and Margaret were thus " in *primo et secundo* gradibus *consanguinitatis*," and he in the same by affinity.

Divorce a *vinculo*, given March 10, 1541, still by the above, between William Quhite and Isabella Ewinston, because William previously " carnaliter cognovit" Katherine Ewinston, " *consanguineam* dicte Isabelle" (evidently cousin-german,) which Isabella and Katherine were " in *secundo*, et *secundo* gradibus consanguinitatis." The preceding cases are from the Register of the Official of Saint Andrews within Lothian. It may be remarked, in reference to the case of John Smith and Agnes Durie, and others, that where the lines of relationship are unequal, the canonist ordinarily " takes the *longer* of the two." For a learned and curious note by Dr. Irving upon the present subject, to whom I formerly referred as an able canonist, besides civilian, see his Life of Sir David Lindsay the poet, in the last edition of the Encyclopædia Britannica, Vol. XIII. P. I. p. 357.

* For what is above derived from Blackstone, see his Commentaries, fourth Edit. B. II. ps. 206-7.

† See p. 15.

‡ The Christian names are thus blank.

the Jacobus Stewart above mentioned, son of the latter again "*qui obiit* in conflictu de *Flowden—tertius;*" and lastly, the aforesaid William Stewart of Tracquair, who succeeded in 1513, "*filius dicti quondam Jacobi—(in) quarto*" *(gradu.)* Thus indisputably the fourth degree of consanguinity only included *three* generations of the *distinct* branch, but *four* degrees, reckoning as behoved from the common ancestor, and not *five*, as would *ex necessitate* obtain, if according to Mr. Innes, the *great* grand-children of cousins-german in such prohibition were comprised.

Margaret Stewart, putative Lady Fleming, in 1508, and afterwards,* was a remarkable person, and acted so as even then to occasion the interference of the Supreme Civil Court,—of her own relatives and connections, nay, of the Provost of Edinburgh, who had strangely the exclusive custody of the Lady,—until the King (James IV,) who may have been attracted by her charms, should dispose of her as he chose. These curious facts are proved by the Acts and Decreets of the said Civil Court. The wives of the Lord Fleming during the reigns of the Jameses and Queen Mary in the 16th century, were destined to notoriety in what would be now called the fashionable world; and they are certainly not undeserving our attention, as they not only illustrate the manners of the age, but also our Consistorial Law. The next and real Lady Fleming was Janet Stewart, still of the Princely House of Stewart. She, and Malcolm Lord Fleming, though aware of their prohibited relationship in the third degree of affinity, nevertheless, "sponsalia per verba de futuro contraxerunt,"—nay, they even had the boldness, when they discovered that they were related within *another forbidden* degree of affinity, of which they had been before ignorant, "matrimonium seu sponsalia hujusmodi in facie Ecclesie solempnizarunt, ac sese carnaliter cognoverunt." Now here again was in reality a putative and uncanonical marriage in Law, which, according to Mr. Innes, was quite unworthy of the attention of the Pope in the loftiness and extreme purity of his character, as we may suppose, and which, to use his identical words, the Pope or his Papal Rescript were "BOUND to *assume—did* NOT *exist*."† But alas, again, he is in fault, for the then Pope Clement VII had no such scruple, but most freely and indulgently, through Laurence "*Episcopus Albanensis*," the organ of his government, on the bare application of Lord Fleming and Janet, (as

Margaret Stewart, putative Lady Fleming.

Janet Stewart, Lady Fleming, a stil more notable person.

Her marriage dispensation again refutes Mr. Innes.

* See p. 12, 13.

† See p. 4.

in the instance of Robert II and Elizabeth Mure*) at once healed their matrimonial status, by one of the two technical methods I inculcated in the emergency.† By a dispensation through the above Bishop as his Vicar, dated at Rome in 1523, upon a special recital of the above facts, instead of feigning or *presuming* their non-existence, he ordered the fond "enamoured" parties, as Crawford had called them,‡ though rather cruelly in the first instance, to be separated; but afterwards benignantly to be absolved from their crime "in forma Ecclesiæ," and happily to refold themselves in each others arms by a regular and now valid marriage *in facie Ecclesiæ.*‖ It is almost needless to repeat that the children, (if any,) previously begot, which seems doubtful, would have been completely lawful by our relative law, being undoubtedly born *in figura matrimonii* followed by a dispensation, and not in mere incestuous concubinage as the issue of Robert II and Elizabeth Mure.

But Jean Stewart, Lady Fleming, was eventually destined for grander objects out of the pale of Scotland. How she may have conducted herself during her husband's lifetime, does not exactly appear; we may therefore, as in doubtful points of marriage and legitimacy, presume in her favour; but after his death in September 1547, at the battle of Pinkycleuche, when in a widowed state, she actually captivated and enthralled his most Christian Majesty Henry II, of France, (like his son Francis II, partial to Scotch Ladies) and disengaged him for an interval from the celebrated Diana of Poictiers, whose power she jeopardized. Like another Cleopatra, to enslave and keep the Royal Hero in her web she repeatedly crossed the stormy main, inverting the order of Leander and Hero, but properly watching her opportunity, and seeking the best and most convenient time for the purpose. This appears by this curious passage in a communication from Masone, the English Ambassador in France, to the English Council, dated April 18th, 1551, published by Mr. Tytler, from the original in the State Paper Office, in a recent Performance,§ "the

Her conquest of Henry II of France and their son Hary de Valois.

* See Appendix No. I. † See ps. 26-7. ‡ See p. 21.

‖ From the original in the Family or Cumbernauld Charter Chest.

§ Entitled "England, during the reigns of Edward VI, and Mary," &c. Vol. I, p. 361. Really a very interesting and attractive work, the best reading of the kind, and for which the author seems well fitted. As to history on the grand scale, that is a little different, and *Periculosæ plenum opus aleæ.*

Lady Fleming departed hence *with child* by this *King* (Henry II); and it is thought that "*immediately upon* the arrival of the *Dowager* in *Scotland*, she shall come *again* to *fetch another*. If she so do, here is like to be a combat, the heart-burning being already very great. The old worn pelf fears thereby to lose some part of her credit, who presently reigneth alone, and governeth without impeach."* The Dowager here, is obviously Mary of Lorraine, and while more respectable, certainly a talented person like most of the members of her family, jealous of any stranger's encroachment upon the royal favour, which she wished to keep and restrict as much as possible to herself and them, and hence, whom the *gallant* widow had cause to dread.

The result of Henry's and Janet's liaison was one who bore the lofty name of Lord Hary de Valoys†, the chief and most highly favoured natural son of the King. What must more ingratiate him with us, she was delivered of the foreign burden in ungenial Scotland, where she carried it like a good Scotswoman, and where both remained until the 22d of August 1560; when wishing to export the treasure to France on the eve of the reformation, for his due preferment, if not hers too, there was an "Address" of that date by the Privy Council of Scotland, to the English Government "for a safe conduct to the Lady Fleming and Lord Hary de Valoys her natural son, by Henry 2d, King of France,"‡ with which, apparently, the latter must have complied. How Lord Hary came to be honoured and exalted, as well as his history and premature death in 1586, may be learned by this excerpt from Anselme.

* Diana of Poictiers, Mistress of Henry the Second, as Mr. Tytler subjoins, then in her forty-fifth year. What is rather singular too, Janet Stuart having attained womanhood, as early as previous to 1523, (see p. 48) could not either then by any means have been a chicken, so the most christian King apparently, like a more modern crowned head, has been fond of "fair and forty." It is impossible there could be any mistake with regard to her. The next Lady Fleming, (and there was no Dowager independent of the former) dame Barbara Hamilton, daughter of the Regent Chatelherault, and the subsequent Wife of James Lord Fleming, her son, was only a *minor* in 1553, when he first made a settlement upon her, with a view to their marriage. This is proved by a legal procedure in that year, in the Act and Decree Register of the Supreme Civil Court.

† This was the usual style of the natural Royal issue in that century.

‡ This is proved by an excerpt to the above effect, taken by Mr. Mathew Crawford, a well-known Antiquary, from the original, in the Cottonian Library in 1748, among his MSS. Collections, in the Advocates Library,—a full copy of which some English Antiquary might possibly favour us with.

" ENFANS NATURELS DU ROY HENRY II.

1. * Henry d'Angouleme, *grand prieur* de *France, gouverneur* de *Provence*, et *Admiral* des Mers du Levant, né de N. (b.)† le Leviston damoiselle Ecossoisse, porta d'abord, le titre de Chevalier d'Angoulême, et eut une compagnie des ordonnances du Roy.—Il eut part au massacre de la S. Barthelemy, selon M. de Thou, liv. 52, se trouva au siege de la Rochelle, en 1573. Etant à Aix en Provence il eut un démêlé avec Philippe Altoviti, Baron de Castelane, capitane de galeres; &c. et l'ayant appercu à une fenêtre, il monta dans la chambre pour le maltraiter. Altoviti tomba d'un coup d'épée qu'il recut, et presque expirant, il perça en se defendant, le ventre du grand prieur qui en mourut 7. au 8. heures apres le 2. Junii 1586. On l'enterra dans l'eglise des Carmes d'Aix en la chapelle de René d'Anjou Roy de Sicile."‡

Henry of Valois, or d'Angouleme, is not to be confounded with Henry de Saint Remy, or " *Henry Monsieur*," as he was called, the other natural son of less note of Henry II,‖ by a different lady of the name of Savigny, from whom that precious and precocious compound of evil, the *asserted Jeanne* " *de Valois*, Comtesse de la Motte," whose name, and thievish address in the diamond necklace affair, were falsely used to blast the pure and unimpeached character of Marie Antoinette, claimed descent; which, nevertheless, I do not find disproved§ in the numerous papers and memorials to which that wretched and paltry affair gave rise.

Jane Stewart, Lady Fleming, a notable bustling lady, after the middle of the 16th century, had several lawsuits with her son

* That is the first or principal natural son, there having been another.

† (b) " Brantome l'appelle *Madame Fleming*, Hist. des Dames." The latter of course is the true version.

‡ Hist. Genealog. et Chronolog. de la Maison Royale de France par Anselme. Edit. 1726, Vol. I, p. 136.

‖ *Ibid.* Besides these two natural sons, Anselme adds, a natural daughter by an other lady, Diana, afterwards Duchess of Angouleme.

§ Carlyle, in " the Diamond Necklace," after curiously lodging her in the Belle *Image* in Versailles, " there within wind of Court, in attic apartments, on poor water-gruel board," to take her chance as an adventurer, exclaims, " Poor Jeanne de Saint Remi de Lamotte Valois, ex mantuamaker, scion of Royalty. What eye, looking into those bare attic apartments, and water-gruel platters, &c. but must, in spite of itself, grow dim with almost a kind of tear for thee."—Crit. and Miscellan. Essays, Vol. V, p. 48. And in truth, if royally descended, this, with her poverty, was the only interesting aspect of so depraved a creature.

James Lord Fleming, who went also to France. Some of the best blood of Scotland descends from her. She was especially the direct ancestrix of the later Lords Fleming, raised to the dignity of Earl of Wigton by James VI, of whom (since the acquisition of the earldom) the noble house of Elphinstone are the heirs of line, and of whom a younger branch, in virtue of an entail, under the exclusive designation and surname of Fleming, now possesses the remainder of the Fleming or Wigton estates.

One word might be here given in passing to Queen Mary, in my Stewartiana. The "phantasy" of her spotless innocence seems now, by most judges at least, abandoned, and it is singular that it should ever have been so keenly maintained in controversy. She evidently had a dash of Joan of Naples in her composition, evoked particularly by the wretched and ungrateful character of her first husband a mere automaton, who was guilty of treason to her, *still* his *liege queen* and *superior*. She was a fine woman, with high *female* attractions and accomplishments,—upon the whole, of a kind, and generous disposition, but tainted to a certain degree, and corrupted by her near maternal relatives, the Princes of Lorraine, of the branch of Guise, who made her too much their tool; yet to whom, most affectionately, as can be strikingly proved, (no bad trait in her character), she remained firmly rivetted to her last moment. Whatever may be her faults, she will always be *the picture* in the History of Scotland. I have often thought her character is not ill hit off by the cotemporary Buchanan, no undue eulogist—who knew her well, in these lines he puts into her mouth :— Queen Mary.

> "Ni mihi tam *fœdus*, tam *dirus avunculus** esset,
> Sæcli hujus Mariæ fæmina prima forem.
> Sed vitiis, quibus evertit Regna omnia, famam
> Polluit ille suam, *polluit ille meam.*"

As to her person, of which so much has been somewhat variously said, she must have been rather upon the large scale, majestic and imposing; but she clearly had a fine tapering neck, as

* The Duke of Guise. His family, and branch of the Lorraines, we cannot either help admiring, for many high-minded and chivalrous characteristics. They had clearly much talent, and though at one time so numerous and titled, comprising the Dukes of Mayenne, Elbœuf, &c. they very recently, wholly failed in the male line, in the person of Charles Prince of Lambesc, or of Lorraine, as he was styled, who died without issue, at Vienna, the capital of the Emperor of Austria, the chief of the house of Lorraine.

is proved by the more certain indication of her coins, and these lines perhaps—quoted by Lord Hailes from a foreign poet:—

> " Omnes hæc formas præstanti corpore, et ore
> Exuperat, Paride et pomum vel judice ferret:
> Hæc *tereti filo*, et *procero corpore surgit*
> Primævo sub flore." *

The date of her birth.

Controversy literally attends Mary from her birth, the date of which has been contraverted. Knox and Robertson place it upon the 8th of December 1542; but Chalmers sharply twits them with error, and maintains it was previously on the 7th.† The following new and original piece of evidence may here contribute its assistance:—

Supplication, dated *December ninth*, 1542, to the Lords of Council, &c., by " Andro, bischop of Galloway, and of oure soverane lordis chaipel ryale of Striveling,‡ aganis Maister Patrik hume," setting forth, " that quhaire it is notourlie knawin, how yat ye said reverend fader, and his predecessouris, bischopes of ye said bischoprik, aucht and suld be present in oure soverane ladies chaipel, amangis ye chanonnis, and prebendaris of ye samin, for doing of devine service yerintill; and speciallie at all hie and festivale tymes, wyt myter,‖ staf,§ caip,¶ and uyeris necessaris belangand to him, and *now* ye quenis grace *is approcheand* to LY, and *seiklie*, and ye feist of ye nativitie of ye birth of our lorde is cummand upone hand, and ye said reverend fader maune do ye said service in ye chapell," &c. therefore he entreats the Lords that they would compell the said Mr. Patrick to deliver to him for such purposes " ye said myter and staf," &c. who had unduly intromitted with, and detained the same, which the Lords order accordingly.** We have thus even upon the *ninth*, Mary of Lorraine, though upon the verge of confinement, not then delivered, so far as known to the Tribunal in question. Chalmers is clearly wrong in his representation, but Buchanan probably the most correct. He states that Mary was born about the fifth day before the death of her father, which he places upon the 13th of

* See his edition of Bannatyne's Poems, Notes, p. 308.

† See Chalmers's Life of Queen Mary, Vol. I, p. 2, and Vol. II, p. 1.

‡ The Bishops of Galloway were ex officio, Deans of the Chapel-Royal.

‖ Mitre. § Crosier. ¶ Cápe, *Pallium*, or cloak.

** From the cotemporary Record.

December.* So it *might* have been upon the ninth, curiously enough, the very day of the above supplication; the event actually then happening, as we may infer, though the tidings had not reached the Lords. At the sametime, it may have been probably upon the eighth. It is seldom we have such accidental piece of evidence like the above, critically *tending* to check a date in *re tam antiqua*.

We may bid adieu to Mary with these additional interesting lines of Buchanan,—

"*Maria Regina Scotiæ puella.*

Ut Mariam finxit natura, ars pinxit: utrumque
Rarum et sollertis summum opus artificis,
Ipsa animum sibi dum pingit, sic vicit utrumque
Ut natura rudis, ars videatur iners."

* Buchanan says that James V died "decimo tertio die decembris relicta filia herede *ante quintam* nata." Edit. 1582, Lib. XIV, p. 172 b. The English translation renders the passage that "he died on the 13th of December, leaving his daughter his heiress, a child of *about* five days old."—See fourth Edit. of the latter, Vol. II. p. 181.

Stewartiana.

III.—STATEMENT AND EXPOSITION OF MR. CHALMERS'S ORIGIN OF THE HOUSE OF STEWART, WITH INDEPENDENT ARGUMENTS AND ILLUSTRATIONS, BUT ESPECIALLY NEW MATERIAL CORROBORATORY PROOF.

Since "my hand is in"—to use a vernacular phrase*—I perhaps may be pardoned with reference "a little more" to the subject of the Stewarts, to notice Mr. Chalmers's origin of that Royal family, as first divulged in the Caledonia. It is certainly his best hit that way,† as may be gathered from the details there, though rather in part obscure and undigested, and perhaps not so appositely or relevantly brought out as might have been.‡ For this reason I propose next to give a more connected statement and exposition of his theory, accompanied with other arguments and illustrations of my own; but above all, with what I conceive to be new and clenching corroboratory proof.

"*Walterus filius Alani*," or Walter Fitz Alan, the undoubted founder of the Stewart family, obtained from David I. who reigned from 1124 to 1153, by hereditary grant, the barony of Renfrew, with the high office of *Stewart* of Scotland, from which his descendants, dropping *his* patronimic or surname, afterwards solely took that of Stewart. At that period, the same Monarch, as is

* Since "your hand is in," friend, said a Scotch nobleman to the bearer, when draining a *stirrup* cup sent him by a facetious party, including George IV, upon leaving them,—pray give me a "little more."

† Of course, however, I at the same time do not regard him as altogether unexceptionable in such matters, though he was a most laborious person, to whom we are indebted for a mass of information, occasionally unfolding what is new.

‡ See Caledonia, Vol. I. ps. 572-7.

First grant of the hereditary office of Stewart to "Walterus filius Alani," or Walter Fitzalan, by David I.

notorious, brought numerous English colonists into Scotland, with the view of subduing and civilizing the more barbarous Aborigines, among which class was the above Walter Fitzalan, indeed as is of itself indicated by the names of his retainers and vassals that are purely English,* and strikingly identified in part with those in Shropshire,† or its vicinity. Perhaps the chief act of his life was the founding the Abbey of Paisley in the Barony of Renfrew. And how was this done? Actually by introducing monks of the Cluniack order from the Priory of *Wenlock* in *Shropshire;* with Humbold, the Prior of which, he accordingly negociated, and who entering warmly into his views, confirmed the sister foundation of Paisley,‡ or Scotch religious branch of Wenlock. As persons are naturally presumed to be attached to their birth-place, and hearth of their ancestors, and not less to their native institutions, especially religious, a great likelihood arises from the above occurrences, that Walter Fitzalan came from Shropshire, which is further encreased by the identical existence of a powerful and distinguished family of the *name* of "*Fitzalan*," or "*Filius Alani*," —*one* and no more *there*—represented at the time by "Williel-mus *filius Alani*," who has thus the exact patronimic with Walter, and hence might have been his brother. This William Fitz Alan was seated at *Oswestrie*, a Shropshire Barony (comprising *Weston*,) that he inherited from his father Alan, (from whence the surname of Fitzalan,) besides possessing *Cardington*,‖ &c. in the same county; but he especially had married Isabella de Say, the heiress of Clun in Shropshire, who, during his lifetime, was the largest benefactrix to the religious house of Wenlock, in *close vicinity to* Oswestrie and the Fitzalan property. This circumstance, joined with the preceding, still more forcibly point at a Fitzalan of Oswestrie descent in the case of the *Scotch* Walter Fitzalan, because the adjacent Wenlock being hence so much patronized, and a revered sanctuary of the family, what more

* This is shewn by Mr. Chalmers in his Caledonia, Vol. I. ps. 575-6. Nay further, it even turns out that the surname of *Caldwell*, at first sight so exclusive to Renfrewshire, was English. William Caldwell, Robert Caldwell, and others of the name, figure in the reign of Edward I. there, see *Rot. Hundred.* Vol. II. p. 808, and Index to the same.

† This will be afterwards minutely proved and exemplified.

‡ Proved by the original Chartulary of Paisley.

‖ See Dugdale's Bar, Vol. I. p. 314. I conceive I may quote Dugdale as an authority, though I would not quote any Scotch Peerage.

likely than that Walter, if a son or cadet—and in order to *civilize*, as was the fact, his adopted land—should import his monks, together with military retainers and Renfrew colonists, from that quarter; while on the other hand, if purely a Scotchman, or indeed elsewhere derived—not alluding to the identity of his Fitzalan surname—it would be *rather difficult* to account for such marked and extreme predilection, and rivetting connection with so estranged and remote a locality. But he, an Englishman, moreover, as is to be presumed from his founding Paisley, "pro *anima* Regis *Henrici*," the English King *(inter alios,)* and his other mortifications in like terms,* not only does so, but further imports Shropshire household Gods and Penates to Paisley—to which they were utterly foreign and unknown, and could not have been selected and cherished from any innate Scotch impulse and tradition. In proof of which he dedicated the House of Paisley to Saint Milburga, the daughter of King Merwald, and niece of Wolpher, the King of Mercia—withal the patron Saint of *Wenlock*.† In this manner an *advena*, like another Æneas of old, he most naturally carried his household Gods and Lares from his own country to his new, under equally happy auspices, seeing he was to be the founder of a royal dynasty that was eventually also to engross the English sceptre, nay not only to hold it, but rule and govern a mighty empire.

Connection of Walter with England and Shropshire.

Neither is the Fitzalan *fraternity* in question, the *less* likely, when, according to Chalmers, William Fitzalan of Oswestrie was devoted to the cause of Empress Maud, the niece of David I, had seized Shrewsbury for her in 1139, and attended Maud and David at the siege of Winchester, in 1141.‡ The Monarch would hence be disposed to patronize and be liberal to Walter Fitzalan, holding him to be William's younger brother, and thus probably of the same party, and include him in his wise and beneficent plan of colonizing Scotland, for which he was just suited, as a younger brother. There was no small congeniality likewise between the two conceived brothers; for, not alluding to their

* Proved by the respective grants in the original Chartulary of Paisley. It is likewise remarkable that his foundation charter, as also proved by the Chartulary, is dated apud *Fo.lrigeiam*, Fotheringhay in *Northamptonshire*, thus again indicating an English connection.

† See Dugdale's Monasticon, new edit. Vol. V. p. 72-3.

‡ See Caledonia, vol I. ps. 574-5.

military and adventurous spirit,—if Walter Fitzalan rendered himself deservedly illustrious by founding the Abbey of Paisley, so also did William Fitzalan, by founding the Abbey of Haghmon, in Shropshire, his own county again, though earlier in the same century.*

Remarkable claim of Richard Fitzalan, Earl of Arundel, to the Stewartry of Scotland by hereditary right, in 1335.

We may now shift the scene a little further on. Of the foresaid "*Willielmus filius Alani*," of Oswestrie, (including Weston,) and of Cardington, Richard *Fitzalan*, Earl of Arundel, (thus keeping the old patronimic which the Stewarts, taking exclusively the surname of their office, had long dropt,) was the male descendant and representative in 1335, the family being now ennobled, and increased in affluence and possessions. In that year when in Scotland, the Earl is proved to have claimed to be *Stewart of Scotland* by HEREDITARY *right*, and thereafter, to have sold his title and claim to Edward III., for a thousand merks; that ambitious Prince wishing, it would seem, to secure to himself every right and interest connected with Scotland. There followed a confirmation of the office by Edward Baliol, in 1340, as superior, in favour of Edward, who thus nominally combined in himself the full possession of the subject in question.†

Its weight in the question.

Here, then, is another striking coincidence, introducing a clearer ray of daylight into the matter; we have (1.) the direct heir-male of William Fitzalan of Oswestrie, &c., in the 14th century claiming a subject as *heir*, that had been undoubtedly heritably vested in the Scotch, cotemporary of the latter,—Walter Fitzalan, the first Scotch Stewart,—both of which remote personages had the same surname, and a connection with Shropshire; while (2.) the King so much trusted to the right of the Earl, as to purchase it for the large sum of 1000 merks. The unavoidable corollary from this may be, that if Richard Fitzalan was thus *a Stewart heir*, and had right to the office, as is clearly admitted by *hereditary* title or descent, the preceding cotemporary, William and Walter Fitzalans, in the 12th century, must necessarily have been of the same stock and lineage—that may have been

* See Dugdale's Monasticon, first Edition, vol. II. P. I. p. 46.

† See Caledonia Vol. I. p. 574. Chalmers here quotes from the Clause Roll, 13, Ed. III. in the Tower, in support of the fact. Anstis, in his Register of the Garter, also notices the transaction, with the confirmation of Baliol, but does not seem to have been aware of its weight. See Vol. I. p. 271.

already evident by plain indications, and from the common surname, in all probability, BROTHERS—which directly corroborates the origin in question, and that of the Stewarts, from the English Fitzalans, (William being the eldest Fitzalan heir and representative); for *excepting* through such likely and special link and chain from Walter, through William, in *no other way*, (so far as I know), could the Earl of Arundel have been an heir to, or had the *least vestige* of *claim* or *pretence* to the foreign office of Stewart of Scotland; while it is naturally capable of being so explained. It is true that the Stewartry had been, according to Scotch law and understanding, in the person of the existing Robert Stewart, afterwards Robert II, (whom we formerly discussed), the direct male descendant of Walter Fitzalan, the first acquirer; but then again, he had previously shewn himself decidedly of an opposite party, and hostile to Edward III in his designs upon Scotland,*—which may well, in consequence of paramount English dictation, have occasioned his forfeiture and exclusion, as that also of nearer heirs,† who had taken the same side. In which event, in a *feudal* age, comparatively rude and arbitrary, and with not the clearest and most distinct perception of things, the then necessarily *emerging* claim or right of the next collateral heir-male according to English views, might have been alone admitted—namely of the above Richard Fitzalan Earl of Arundel, the heir of William Fitzalan of Oswestrie, in right of the latter, *quæ* at least a near relative, *or* of the same stock—at a time when it was but scanty—with the said Walter Fitzalan. However, this remarkable *Stewart* occurrence may be *precisely* viewed, its jet and import to such presumed conclusion, as things stand, must, of course, be much appreciated in a case involving circumstantial evidence like the present; and further still, the conclusion so far from being the least traversed, will be pointedly supported, nay in effect clenched, it is apprehended, by what will transpire.

There is thus upon the whole, *in hoc statu*, every presumption

* See Andrew Stuart's Gen. Hist. of Stewarts, ps. 31-2-3. In 1334 Edward III. kept Royal state at the Castle of Renfrew in the centre of the Stewarts patrimony, and distributed lands to his adherents. *Ib.* p. 33. See also Hailes Annals for the period.

† The Stewart estates, of course with his vassalage, had also, (*so far* as he could,) in 1334, been granted to the Earl of Athol, by Baliol. *Ibid.*

and likelihood of the truth and correctness of Mr. Chalmers's theory; but still it may not be denied that it would not be the worse of corroboration. As yet, in no English pedigree, either by Dugdale or others, of the Fitzalans of Oswestrie and Cardington, &c. that I have seen, is there the least trace or mention of any *younger* son of the family whom we might be able to connect or identify, as may be incumbent, with the *Scotch* Walter Fitzalan; though the latter is affirmed by Mr. Chalmers to be such younger son, and upon which fact and identity—yea or nay—his theory in reality must depend. On the contrary, "Willielmus filius Alani" of *Oswestrie* and Cardington,* &c. is invariably represented as the *only* son of Alan the heir of Oswestrie, his father,† the founder and ancestor of the Fitzalans. Neither is there any *previous* scion in the pedigree whereon to engraft the Stewarts necessarily as cadets, while this is utterly excluded by chronology after the time of William. These circumstances, whatever may be the great *vraisemblance* of the descent in question, in other respects as premised, might even be *rather* said to impugn, or to afford negative evidence against it.—If, therefore, we could yet, notwithstanding, prove the *existence* in Shropshire of a *younger* son or brother of the early and *material* ancestors of the Fitzalans—nay more, if we could prove that he was an *exact cotemporary* just as required—nay, farther still, that he was even distinctively styled "WALTERUS filius *Alani*," and hence brother of William, thus bearing, by still more marked *re*-coincidence, the *identical* Christian name and surname of "WALTERUS filius ALANI," the founder of Paislay, from Wenlock in Shropshire—while he held lands (evidently in appanage according to prevailing custom) *at Oswestrie*, of the Fitzalan Fief or Barony, closely adjacent also to lands of the Priory of Wenlock, if not under its spiritual jurisdiction—and whose head-quarters were in a neighbouring Hundred of the county—I humbly submit that the important *desideratum* in question, nay, what may clench the case in the circumstances, will be supplied. And in support of the above, I appeal to the new evidence that follows, taken from a formal inquisition made in 1185, into all *previous* grants, in favour of the Knight Templars, their possessions and revenues at large, &c. by

Conclusion in *hoc statu*.

* See p. 56. Carditon and Cardington are the same.

† See Dugdale's Bar, Vol. I. p. 314.

Galfrid Fitzstephen, " quando ipse suscepit balliam de Anglia,"— which is inserted at full length in Dugdale's Monasticon,—and from which these are excerpts :— New evidence in support of the Stewart Fitzalan Descent.

" De *redditibus* balliæ* *de Warewic.*"—

" De Ecclesia de *Carditona* III. marcas, de *elemosina Willielmi filii Alani.*"

. . . . . .

" De Cestretona de *elemosyna* Willielmi *Croc*,† Ricardus monachus pro I virgata VIs. Wluricus pro I virgata, VIs. ;" *(then immediately in the same paragraph follows this next entry at the distance of seven lines) :*—" De feodo *Willielmi filii Alani* in *Westona*" Willielmus Stoc pro virgatiss VIII."

. . . . . .

" Apud *Carditonam ex dono* WILLIELMI *filii* ALANI tota villa de *Carditona*, et *Huchemerse*, et dimidia villa de Chattewelle,‡ et confirmatione domini regis. Adam Albus pro dimidia virgata XL. eli ; *(after which immediately)*, Apud *Covetone ex dono* WALTERI FILII ALANI Robertus et Hamo filius, pro I. virgata Vs."‖

There is no question that William Fitzalan, the proprietor of Carditon, and granter of the same to the Knight Templars, was William Fitzalan of *Oswestrie*, the undoubted Fitzalan or Arundel ancestor ; and such being the fact, the next pointed insertion of the grant by Walter *fitzAlan*, of part of Coveton, there tenanted, as stated, to the gallant fraternity,—immediately after the former, together with the common identical patronimic of *Filius Alani* to both, when that distinguished Salopian

* The possessions of the Knight Templars in England were thus again divided into Subaltern Bailieries. And what follow are the entries of the donors lands, with the tenants their revenues and issues, &c.

† This grant by Croc will be specially alluded to on another account in the sequel.

‡ Dugdale, in his Baronage, explicitly says, that William Fitzalan of Oswestrie and Clun, the ancestor of the Fitzalans Earls of Arundel, gave these lands to the Templars. So the above is evidently that person. See vol. I, p. 314.

‖ Dugdale's Monasticon, Edit. 1830, vol, VII, ps. 821–831, within which this curious Inquisition is entered ad longum, prefaced with the intimation, that it was " *Ex codice in Scaccario penes Rememoratorem Regis.*" All the above entries are in the Bailiery of Warwick. What a treasure of information of the kind is Dugdale's Monasticon ; and how deficient our Ecclesiastical Records are, owing to the wild tumult and destruction of writs at the Reformation, besides other causes ! What remains, however, promises to be pre-eminently perfected as far as possible by the strenuous efforts and talents of Mr. Turnbull, Advocate, who is to favour us with a Scotch Monasticon.

patronimic was only in its infancy as a surname, and there was but one family of *Fitzalan* in that district, evidently proclaim him to be brother of William; nor is the point unsupported by what was premised, while it will be corroborated *still* by what follows. The preceding was a family transaction, both William and Walter Fitzalans being military too as well as religious, and influenced with the same spirit and favour towards the Knights Templars, which accounts for the grants being in exact juxtaposition; and hence on all hands cotemporary. Before proceeding with my remaining authorities, I may here, in illustration or expiscation of the farther material import of the above piece of evidence, adduce the following letter from Mr. Chalmers himself, raiser of the theory, that I received long ago, in answer to one I wrote him, communicating this new information, with relative remarks, of course from the source I found it—Dugdale's Monasticon.*—"I lost no time in following your reference into Dugdale's Monasticon, which is a book of vast information, with some mistakes, and very bad indexes. Neither William, the son of Alan, nor Walter, the son of Alan, are in his index, at least I could not find them when I looked into the book, in pursuance of your intimation. You are most perfectly right in my opinion in supposing that William, the son of Allan, and Walter, the son of Allan, who are recorded in the pages of the 2d Dugdale as the benefactors of the Knights Templars, are undoubtedly brothers, the sons of Allan, the common stock of the Stewarts. Among grave people there cannot be a doubt upon the point. You are also perfectly right in your inference, that this fact, as it is evidenced by the record, is a strong butress to my theory of the origin of the Stewart family from Shropshire. It proves another point, of which I was not aware, that Walter, the son of Allan, the first Stewart, possessed some property in Shropshire. Whereas I had conceived him to be a younger brother, without any such property, when he emigrated to Scotland.

Letter from Mr. Chalmers relatively.

* I am almost ashamed thus to adduce Mr. Chalmers' letter, owing to the too flattering terms of my venerable correspondent, and had no intention of ever doing so, had it not been for the present publication. I had thrown it aside, nearly forgot, among a quantity of miscellaneous correspondence, from which it was only rescued last summer, when searching for other papers. Had it not been for this, the communication might have perished. It may be, however, interesting, as confirming my views, but especially from the sanction, as transpires, given by that great authority, Sir William Scott, afterwards Lord Stowell, to Mr. Chalmers's theory.

2dly, As to the *names* of places called for by the Record in Dugdale, see Adam's Index Villaris, London 1680, *folio*, which you may buy for waste-paper price. The *Carditon* of the Record is the Cardington of this Index, lying in Salop, Munslow hundred, and in the *vicarage* of *Wenlock*. The *Coveton* of the Record is the *Cotton* of the Index, *in* Salop County, and *Oswestry* hundred. *Here* you see that Walter, the son of Allan, had property in *Oswestry*, the *lands* of *his father* and grandfather, the first purchaser. As to *Weston*, there are a thousand Westons in England. But there is one *Weston* in *Oswestry* aforesaid, and shire of Salop aforesaid. Again, you perceive what a coincidence! to confirm the general inference. Yes, truth is easily supported, but falsehood cannot be proved. And you have furnished a very strong proof of the truth as to the real origin of the Stewarts.

Some of the ablest men in England are quite satisfied of the truth of my position as to the origin of this family. When I name the Right Honourable Sir William Scott as perfectly satisfied, you will allow, as a judge, as a man, he is a great authority. You are also right in supposing that the difference of the armorial bearing of the Fitzalans is but a slight objection."*

But over and above, independent of these territorial intimations of Mr. Chalmers, I am able perfectly to fix where Weston lay, (for Cardington,† clear Oswestrie patrimony, need not detain us) certainly belonging to William Fitzalan of Oswestrie, as well as with equal ease the locality of Coveton or Cotton belonging to *Walter* Fitzalan. By the Map of Shropshire, in Smith's English Atlas published in 1804, both these places will be found to be in exact contiguity, and within less than a mile from the precise *site* of Oswestrie, the *caput Baroniæ* or Fief of Oswestrie, *that* forms somewhat of the *apex* of a triangle, of which *Weston* and *Cotton*

Illustrations and corroborations.

* Upon the latter point I may add, that arms were only introduced and fixed in Scotland the next century to that in which the Scotch Walter Fitzalan, the first Stewart, figured, and he is never proved to have borne any; while those his descendants thereafter carried the fess *cheque*, were evidently derived from, and expressive of the office of Stewart, there having been a chequered covering, "*co-oportura*," thrown over the table of Exchequer, through means of the checks upon which, the rents and casualties of the kingdom, originally collected and accounted for by the Stewart, appear to have been more easily calculated and rendered. By this means, with the attendant aid of minstrels and their music, as can be proved, intricate matters were facilitated, or rendered less rugged and irksome. The arms of the Fitzalans of Oswestrie, afterwards Earls of Arundel, were a lion rampant.

† See *ut sup.* as to Carditon.

Especially by *Testa* de Nevill, which, taken with the other proof, fixes Walter Fitzalan to have held lands in Oswestrie of the Fitzalans.

may be the slanting base; while by the *Testa de Nevill*, or *Liber Feodorum*, an English record of fiefs with their tenants, in the reigns of Henry III, and Edward I, (including from 1217 to 1306) both Weston and Cotton or "Coten,"—evidently the same, are proved repeatedly to have been parts and pertinents of the great Fitzalan fief in Shropshire.* The lands clearly feudally held of the latter; so that Cotton, withal, being at the very principal Messuage or Castle, was just precisely what, according to the practice of that age, would have been given in appanage to a younger Fitzalan son; hence further shewing, if that were requisite, its possessor, Walter Fitzalan, to be so. Appanaging or providing younger sons in parts of the paternal Barony (in the then great want of other means, as now for the purpose) and suiting well in keeping them alike in feudal dependence, and making them feudally useful to the Liege Lord and Superior, in that warlike period, was, as can be abundantly fixed, common to both Kingdoms. In fact, the possession by the Stewarts of Castlemilk in the 14th and 15th centuries, of a portion of the Darnley property, which they held in like manner of the Stuarts of Darnley as superiors, must be viewed as the principal argument of Andrew Stuart in behalf of the former being cadets of the latter, in the competition between him and Lord Galloway, last century, for the male representation of the Stewarts. And of course it would follow for the most part, that the nearer the locality of the Appanage to the principal Messuage of the Fief, the nearer the descent of the corresponding vassal might be inferred to be, as the Lord Paramount would wish naturally to be protected by his nearest relatives and friends, while he might also thus have them under his due controul and view. But the above *Walter* Fitzalan is moreover *nominatim* directly proved by another authentic English record still ancienter, to have been an actual feudal vassal of the same Fitzalan fief, during the very time of William Fitzalan, thus necessarily in right of Cotton, with the addition probably of other lands. The *Liber Niger Scaccarii*, published by Hearne in 1771, and said by him to be the

* Thus to give proof there, under "*Baronia Johannis filii Alani* in *hoc comitatu*," *(Shropshire)* "Hugo de Weston" is entered as holding of the same, dimidium *feodi in Weston*, and "Coten Mauvoisin" in like manner "dimidium feodi *in Coten*." *Testa de Nevill ut sup.* p. 49. *John* Fitzalan was the Oswestrie male heir in the 13th century. And the same statement or entry is literally repeated subsequently at p. 50, 51, *ibid.*

next oldest register of the kind after Domesday Book, and to contain lists of the noble English *Feoda* " tam de *veteri* feoffamento (id est tempore *Henrici I*, vel etiam *antea)* quam de *novo*—*postquam* jam regnare *cœpisset Henricus II*—that is, from 1100 to 1154, when the latter began to reign,*—under the head of Shropshire, gives the great *Feodum* " Willielmi *filii Alani* de Salopescire," in the list of the respective vassals of which, there is articulate mention of " *Walterus filius Alani*" as holding "*feodum*," II *militum*.† This therefore is a pointed corroboration of all premised, both in regard to Walter's peculiar Oswestrie appanage or feudal provision and connection, as well *as descent*.‡ Further new evidence from *Liber Niger*.

Then again—all that remains now to be shewn in this place—as to the exact contiguity of possessions of the Priory of Wenlock to Cotton—if it had not also spiritual control over the latter—it is proved by extents and rentals of that religious house in 1380, and at the Reformation, as by the subjoined evidence, that they had property in, and revenues from *Weston*, which, as has been established, precisely marched with *Cotton*,‖ besides drawing a pension from Shrewsbury, that is, upon the very confines of Oswestrie, nay, holding the manor of Sutton, adjacent to the city.§

I have, therefore, I conceive, now established the material facts I started, that there was co-temporary with the Scotch Walter Fitzalan, (who figured in Scotland before and after the middle of Conclusions.

* See this relative compilation of Hearne entitled " Liber Niger Scaccarrii," but containing other matters, vol. I, Pref. ps. xiii, xiv.

† Ibid, ps. 142-4.

‡ Might not some of the older title-deeds, possibly still extant, of the Fitzalan property, or Cotton or Weston muniments in England, throw even additional light upon the question? I might perhaps take the liberty of suggesting this to English antiquaries. By the way, I observe in the Calender of the English Patent Rolls, under the 24th of Edward I, (1296) this entry, " Rex confirmavit Senescallo Scotiæ, ae Egidiæ uxori ejus in *generali tallio* Castrum et Burgum del Roo & eis concessa per Ricardum de Burgo Comitem Ulton. et Dominum Connacen." (p. 58. b.) A full copy might perhaps be important in other respects.

‖ See p. 61.

§ " Extenta Possessionum Prioratus de Wenlock," A.D. 1380, stating, *inter alia*, that the Prior had certain *redditus* or revenues in diverse hamlets, " videlicet Hopton, *Weston*, et Monghall" in *Shropshire*. " Computum Ministrorum domini Regis. tempore Henrici VIII," wherein the Prior of Wenlock is stated to draw 4li. 13. 4. out of Weston and Hopton, &c. from "*firma* decimarum," and to be entitled to the rent, " unius tenementi" in Weston. It also has the proceeds to the Priory from the manour and mill of *Sutton*, "*juxta Salop*," and their pension out of the latter or Shrewsbury. For the above see Dugdale's Monasticon, new edit. Vol. V. pp. 77—80-1.

the 12th century, and died in 1177, while William Fitzalan, of Oswestrie, figured during much the same period, though he predeceased in 1160,*) actually a Walter Fitzalan, " Portioner" of *Oswestrie*, (Cotton being a tenement of the latter,) holding (by way of provision,) of the fief of Oswestrie, and the younger brother of William. He was in that predicament likewise, that would naturally every way—from regard to his family and his county, bind and connect him to the adjacent priory of Wenlock, with which his early veneration and religious sentiments would be identified, and that in the event of his colonizing a foreign district, and wishing to extend thereto the benefits of a religious establishment, would *ante omnia*, induce him to import monks—as the *Scotch* Walter Fitzalan certainly did,—who had withal a direct connection with the same reverend fraternity—from that quarter. This *ex necessitate* alone, in the perfect absence of any other cotemporary Walter Fitzalan—while backed with the identity of the Christian name and surname—may indicate that the former were one and the same Walter, and hence go far indeed to settle the question. But even independently still,—and not alluding to the pointed corroboration from the claim to their office, as *heir* of the Scotch Stewarts, by the male descendant of William Fitzalan of Oswestrie, in 1335, and what has preceded to the same effect,—it so happens there are things *aliunde*, that warrant and rivet the same conclusion. We have further, in support of the *identity*, the striking argument of the *Scotch* Walter Fitzalan having colonized Renfrew, by persons, *(inter alios Anglicos,)* whose surnames *exactly* correspond with those in Shropshire—nay more, in *close* dependence and connection with the Fitzalans of Oswestrie, including *Walter Fitzalan* the *Portioner*, there.

Further corroborations.

Among the grants to the Knight Templars alluded to, antecedent to 1185, immediately preceding that of William Fitzalan of Cardington and Oswestrie in their favour, there is one, as has been shewn by *Willielmus Croc*, of the lands of Cestreton, to the same distinguished brotherhood.† Both grants are included, too, within the same Bailiary, and *Croc* can be *aliunde* proved an early English surname.‡ Hence William Fitzalan and the Crocs may

* See Andrew Stewart's Hist. pp. 3 7, and Dugd. vol. I. p. 314.

† See p. 59.

‡ *Adam* and *Reginald Crocs* figure in the county of Northampton in 1217, *Rot. Lit. Claus.* p. 247, while Matthew *Croc* witnesses an early deed connected with Brecknock, in Dugdale's Monasticon, first edit. Vol. I. p. 322.

be presumed to have been in juxtaposition, and to have a joint interest, and probably connection, in the same quarter. Now, it remarkably happens, in clear reciprocal keeping with this Fitzalan and Croc connection in England, that together with other persons of the undoubted Shropshire surnames of Montgomery, and Costentin, and the *Scotch* Walter Fitzalan himself, there figures a "Robert *Crok*," (the first of the surname in Scotland), as witness to a grant by Eschena, Walter's wife, of lands in Molla to Paisley, which, though without date, must have been before 1177, when Walter died.* The Scotch Crocs besides are traced down continuously in the Chartulary of Paisley, and elsewhere, in the persons of Alan Crok, Symon Crok, &c. while there can be little or no doubt that the celebrated Crocston, or Cruikston Castle, derived its name from the original Crocs, whose possessions afterwards came to the Stewarts of Darnley, the male ancestors of James VI, and whom Walter Fitzalan had planted as his feudal vassals, in the exact vicinity of Paisley, where the Castle is situated. It is also remarkable, that *Robert Montgomery* witnesses the previous ancient Charter by Eschena, the wife of Walter, while Alan Montgomery early ones, without date, (as usually holds) by him in the Paisley Chartulary. The surname of Montgomery was completely Salopian, and is in an especial manner connected both with Shrewsbury, in the exact vicinity of Oswestrie, and with Wenlock, because the Montgomerys had obtained upon the conquest the Earldom of Shrewsbury, nay further, had actually been the direct and more immediate founders of Wenlock, that had been much neglected, and gone to decay since the time of the holy Milburga.† Here then is another striking coincidence, still indicating, in the case of their adherents and followers, a direct Stewart connection with the above important localities. Besides the preceding notices of Robert and Alan, there are various other early ones of the Montgomeries in Renfrewshire, who obtained the lands of Egilsham there, and founded, as is notorious, the great family of the Montgomeries, Earls of Eglinton, now extinct in the male line.

Again, among the ancient list of vassals and military tenants

* Original Chartulary of Paisley. The date of Walter's death is proved in that year by the Chronicle of Melrose. Cro*k* and Croc are of course the *same*.

† Dugdale's Bar. vol. I. p. 26, *et seq.* and his Monasticon, new edit. vol. V. p. 72.

of the "*Feodum Willielmi filii Alani*," in Shropshire, and of *Oswestrie* cumulatively, given in that venerable Record, the *Liber Niger*,* along with the *English* "*Walterus filius Alani*,"—to *split* the *individuality* however, of only one Walter Fitzalan, as conceived,—we find, "Helyas de Costesin," (Costentin) tenens (there) "feodum I militis."† There is also further mention of the Costentins, as feudal vassals of the same fief, or Barony of Fitzalan, in the next century, in the persons of *Thomas* and *Galfrid* de *Costentin*;‡ while very remotely indeed, a charter by *Willielmus filius Alani*, (of Oswestrie,) the ancestor of all the Fitzalans, of lands to the Abbey of Haghmon, which he founded early in the 12th century, in Shropshire, is witnessed by *Ricardo* de *Constantin*.‖ Hence, while there are other similar notices, it cannot be questioned that these Costentins had the most close and intimate connection with the English Fitzalans, and if so, that identically again held, as in the previous cases, between them and the Scottish; the Costentines naturally extending their attachment and feudal support to the latter, as of the same Fitzalan stock and lineage; for, as is expressly established by the Chartulary of Paisley, *Robert de Costentin*, *Galfrid de Costentin*, (whose name thus exactly corresponds with an English Costentin.)§ *Walter de Costentin*, nay *Nigel de Costentin*, all witness an early grant by Walter Fitzalan, the first Stewart of the lands of Ledgerwoode, church of Cathcart, and other possessions to Paisley, besides figuring in the same capacity elsewhere, while the family are uniformly proved to have been his Scotch vassals.

In the previous list, too, of English Oswestrie co-vassals with the English Walter Fitzalan, in *the Liber Niger*,¶ there appears "Robertus filius *Halufri*," which I cannot help thinking is a mistake for "filius *Fulberti*;" and again there is "Robertus filius Fulberti," held to be the predecessor or ancestor of the Pollocks of Pollock, also vassals in the Barony of Renfrew, who is a witness to the old charter mentioned by Eschena the wife of the Scotch "Walterus filius Alani" to Paislay,** while Robert and his heirs likewise figure elsewhere in the same Chartulary.

* See p. 64-65.

† Hearne's Liber Niger, *ut. sup.* vol. I. p. 143.

‡ *Testa* de Nevill, pp. 44-52.

‖ Dugdale's Monasticon, vol. II. P. I. p. 46.

§ See above. The slight varieties in the orthography of Costentin are immaterial.

¶ *Ut sup.* at p. 143.

** See p. 67.

The Scotch Walter Fitzalan being clearly a Colonist, these persons, his Renfrew retainers and planters, Crocs, Montgomeries, Costentins, and probably Fitzfulbert, with their hitherto unknown appellations there, as well as habits, we may conclude, have come with him, on all hands from some quarter perfectly foreign to Scotland; and where can that quarter better be, from the identity of the surnames, than Shropshire, more especially Oswestrie or the Salopian district of the Fitzalans, where, *vice versa*, they have been shewn to be so astricted, and familiar. Such presumed connection, repeatedly thus pointed and express, would seem incredible and miraculous if differently founded. And if it attaches the followers to that district, it binds their chief and leader to it also. And, hence taking this peculiar fact with the striking one of there being suddenly *no* trace or mention of the *English* Walter Fitzalan or his issue—*subsequent* to that in the *Liber Niger*, where he last figures, *(in England,)* either in the recenter continued lists and registrations of the vassals of the Fitzalan of Oswestrie, *Feodum*, as established by the *Testa* de *Nevill*, and otherwise, the plain corollary seems to be, that he had then—bent, no doubt, upon excellent "missionary schemes," wholly vanished from thence—just as the *Scotch* Colonist Walter Fitzalan must have done from his *Lares* or especial locality—hitherto elsewhere undiscovered—and as we may conclude to Scotland. But while this obtained, he could not well, in such a feudal age, no more indeed than a person in the present, on an analogous emergency, go alone, and therefore it behoved him to be attended by strict local friends and connections, who, in the case of the English Walter Fitzalan, were *most likely* to be from what has been shewn, the identical aforesaid Crocs, Montgomeries, Costentins, &c.

This seems agreeably to connect and identify him with the *Scotch* Walter Fitzalan, and exclude the harsh and unnatural disunity. It may be asked, could the above, with so many uniform and recurring co-incidents, all referable to Shropshire, comprizing Oswestrie and Wenlock, have possibly happened, if the said Walter had not been *ante*-connected, as stated, with these localities? It is conceived they could not. We would not then have had even a fragment of what has transpired; and if so, without further tediousness and circumlocution (of which there has been enough already), we may now put an end to the ques- Conclusion.

tion—combining all the mutually adherent and corroborative facts to the same issue—the remarkable distinctive family patronimic of " filius *Alani*," rather then unusual, and given *per excellentiam*, both to William of Oswestrie, and to Walter, the cotemporary first Stewart—the exclusive identity in the *christian* name again, as well as situation, and Shropshire connection of the latter, with the also cotemporary *Walter* Fitzalan, *portioner of Oswestrie*, the *brother* of William,—and especially still the same William Fitzalan's male descendant, as *heir*, in the circumstances, by due family *reciprocal* relation,—having claimed the office of Stewart of Scotland in 1335, the original heirloom of the Scotch Fitzalans, which is only practicably to be explained, and can concurrently be so, at that particular æra, by the first Scotch Walter Fitzalan, and the first Stewart, being brother of the preceding William,—besides the constant various other affirmative incidents, &c.—while there is no contradictor—unnecessary to repeat. Far worse claims than that of Richard Fitzallan, Earl of Arundel, to the Scotch Stewartry in 1335, could be cited in much later times, including that of Richmond (in his *individual* person,) to the Crown of England, towards the end of the 15th century, which stood upon a very questionable kind of representation, even in its *professed nature*, involving two obvious intrinsic objections ; besides he himself being, upon his own ground, as literally in the Arundel instance, not the *nearest* heir, but a remoter.

The evidence in regard to the Stewart origin may be held curious in *re tam antiqua*, when to all who investigate into such things it is notorious, how difficult it is, for the most part, (not unprecedentedly even in rather modern times,) to connect a younger branch of a family, remotely and collaterally sprung, with the parent stock, whose ancestors, like Walter Fitzalan, had fully denuded themselves of their native patrimony, and emigrated to a foreign country, with which they had become identified, and exclusively connected. It is remarkable, too, that in the Stewart instance, all illustrative transpires from proof, previous to their becoming a Royal Dynasty, and when, however, in the first rank of the community, they still solely figured among the Barons or nobility.

Stewartiana.

IV.—CRITICAL REMARKS IN CERTAIN RESPECTS UPON MR. INNES'S INTRODUCTORY PREFACES TO THE SCOTCH CHARTULARIES, RECENTLY EDITED BY HIM.

As was formerly shewn, the question of the legitimacy of the Stewarts, with the relative matters discussed under that head, involve and raise various important points in our Consistorial law and practice, which the former tend in no small degree to illustrate or mature, while they may be not only of common actual occurrence, but were likewise indispensably mooted, and enquired into, in the weighty modern cases of Macadam in 1806; Riddell *v.* Brymer, in 1811; and Ker *v.* Martin, in 1840, in which last, indeed, this very Stewart case, in most requisite illustration, was pointedly referred to, and canvassed on both sides. Combining the above with the remark of an able Scotch Judge, Lord Kaimes, who lived down to 1782, that "*few* branches of our law are handled with *less precision*, than what particulars are necessary to complete a *marriage*," and that the relative subject is involved in "*darkness and confusion*,"* *that* namely which we have been in part probing—and thus evincing the necessity of farther elucidation and investigation,—I cannot but think the consistorial topics comprised in the Stewart question might not only be interesting to lawyers, but material, nay even called for, in the profession. Unless it is prepared to be main-

Importance of the legal points involved in the case of Robert II, and Elizabeth Mure, though such undervalued and despised by Mr. Innes.

* Elucidations of the Law of Scotland, Edit. 1777, p. 29. In re-examining this work I find the learned Judge broaching ancient consistorial matters like myself, and introducing my old friends (however strange to others,) the Emperor Leo and Pope Innocent III. &c.—But hush, this is a most imprudent disclosure, it may prejudice his Lordship in the mind of Mr. Innes, from whom it ought to have been concealed, as he may now, with equal reason, designate his Lordship as thus indulging in discussions that an antiquary *might* despise, or as one of those unfortunate plodders who broach questions that "have fortunately taken their proper rank as mere subjects of antiquarian curiosity." (*See afterwards.*)

tained on the other hand, contrary to the opinion of the first legal authorities in both kingdoms, that the law of marriage, divorce, and legitimacy, are secondary affairs, and rather fit for a "*Pie-powder court*," than the upper and higher tribunals. Of the latter opinion, however—notwithstanding, again, the zeal and care displayed by the English Judges in the recent consistorial case of Birtwhistle, and weighty point of Presbyterian marriages, even at the present moment,—Mr. Innes would *appear* to be; for in his late Preface to the Chartulary of Glasgow, he represents the identical case of the legitimacy of the Stewarts—with an indirect hit against myself for raising the points there, I have done—(he being, as I observed before, never very direct or express in his arguments and objections)—as a "*mere*" *subject* of "antiquarian *curiosity*."* Nay, he has gone further still, and evidently in the same circuitous method insinuates, that it is an enquiry even that an antiquary might despise.† I am truly sorry that the subjects I have been fated to discuss, have thus not had the good fortune to meet his taste and approval; and therefore, let us now see what else of a *more* interesting and important nature in his way we may next politely select to broach and canvass with him. I think I have hit the thing—I think I have found such. In his preface to the Chartulary of Paisley, he, *e converso*, is at great pains to vindicate the "usefulness" of the "study of *genealogy*" and to raise it from the "disrepute," it seems, into which it had fallen. He even there eulogizes it as "a *very captivating* pursuit."‡ Nay,

Genealogy Mr. Innes' captivating and darling pursuit, and therefore now, in complaisance to him, to be gone into.

* When noticing the state of the Stewart question in all he evidently conceives material, after the discovery of the dispensation in 1357, and rectification of the mistaken order of Robert the Second's marriage, he quite unqualifiedly adds, "*It was reserved* for the ingenuity of *later* Writers to *raise other* objections, *after* the *whole* disputes have *fortunately* taken their *proper* rank as *mere subjects of Antiquarian curiosity*," Pref. to Chart. of Glasgow, p. xl. Most unfortunately I do not see how it is here possible to escape Mr. Innes's infliction, *having been* so rash and full hardy, as to be *one* latterly (in a *previous work*) who has thus actually ventured to raise such objections upon *now* so very secondary and empty a *topic*. I am here, alas, *ex necessitate* completely hooked in —and it may therefore have been incumbent upon me, to defend myself against the imputation of dealing with trivial subjects, and *e contra* to prove their just importance as I have attempted *inter alia*, while I also exposed the errors and misconceptions of my assailer, who perchance may *not* be the *most* acute or *prevoyant* in such points.

† As formerly shewn, (see p. 4.) he prefaces his suggestions or objections to me with these words. "But for the zealous Antiquary who *does* not *despise* such *enquiries*, I would suggest," &c. the *notable* suggestions we have disposed of, &c. and which I humbly submit, conveys the idea that there *are Antiquaries* (possibly including himself), who *may* actually despise them.

‡ See Pref. *ibid.* p. xxi.

further still, in his preface to the Chartulary of Moray, he says, that "*undoubtedly* the GREATEST *interest* of a publication like the present arises from the *early* mention of places and lands *and* FAMILIES,"*—of course involving their origin and descent. No other subject therefore in the Antiquarian department not only is *so* captivating as genealogy—in other words, that just mentioned, in Mr. Innes's estimation, but so engrossing and transcendant. Hence, contrasting these avowals with his strictures formerly given from the Chartulary of Glasgow, in reference to the *other* secondary, nay unworthy pursuit, he must of a truth appreciate and prefer the former—the object of his most cherished predilection, far above the latter. This then will do, however some misjudging people may not entertain such exalted idea of genealogy—nay, may be even so obtuse and singular, as legally to rank it in value and importance far below questions of marriage and legitimacy; they must yet evidently be mistaken. We will adopt Mr. Innes's bias and standard, and with all due humility, so far attempt to approach his orbit, under the presumed assurance of much edification and improvement,—seeing those commonly excel in that, wherewith they are most captivated,—the *posse* is here frequently the consequence of the *velle;* but at least he may be expected to be in some degree versant and *au fait* in the matter, and hence, necessarily instructive.

With this far more congenial, and weighty subject therefore, the *Genealogical pursuit*,—I shall next, "since my hand is in," resume the discussion with Mr. Innes, and first, through the *medium* of the aforesaid Chartulary of Paisley,—already familiar in part, to my readers, where he, as it were, (independent of that of Moray,) publishes his bulletin, announcing his delight and extreme captivation with the study. Mr. Innes extols in the Preface, "the Genealogical *stores treasured*" in the Chartulary, nay he even says that it not only "*illustrates* the *origin*," but "contributes *our* CHIEF and most *authentic information* regarding the *early descent*" of the *noble House of Hamilton*, among others.† The latter intimation certainly was new to me; I was pretty familiar with the Chartulary, as well as with all such Scotch Registers; and however respectably it might conduct itself as an authority, and gain our admiration otherwise, after the fashion of Uncle Toby's bull, still I had thought, that like him also, it was here equally unpro-

The chief and most authentic information regarding the origin of the Hamiltons, according to Mr. Innes, to be gained from the Chartulary of Paisley.

* P. xxxi. † P. xxi.

lific. Upon this account, I re-examined the precious Register, but found it contained only notices of some Hamiltons at the comparatively late date of the 15th century, *utterly* unimportant, resolving into the *bare* mention of James Hamilton, *Dominus ejusdem* in 1449, of whom, and his ancestors, there are *elsewhere* innumerable important accounts for a century and a half before,—James Hamilton of Torrens, and of John Hamilton, of Kyngishalche, as recent as 1466,* with one or two glimpses of a *Walterus filius Gilberti*, the patronimic appellation of Walter the Hamilton ancestor, in the reign of Robert Bruce.† But however, from this rather vague patronimic, we may not be quite sure of his Hamilton identity, he simply figures as a witness; while again, we have *other* far more special and valuable intimations of Walter, the real Hamilton ancestor, not only when he obtains from Robert Bruce the lands of Machan and others, including Kinniel,‡ but as far back as 1296, when, as a Lanarkshire proprietor, he swears fealty to Edward I, under the explicit denomination of "Wauter fiz Gilbert de Hameldon."‖ I hence remained in utter

* See printed Chartulary of Paisley, pp. 246-149-50-1.

† See Index, *ibid.*

‡ Proved by grants upon record, and Lord Haddington's collections.

‖ Ragman Roll, p. 166. As well known, this roll had also long ago been published by Prynne. Walter almost never took the surname of Hamilton, which, however, was given to him by his descendants, in whom it became fixed; for there is referred to, as in the Hopetoun charter chest by Andrew Stuart in his History of the Stewarts, (see p. 76,) an original charter about 1369, by John Stewart, *Dominus* de Crookstoun or Darnley, "dilecto confederato nostro Johanni filio *Walteri dicti* de *Hamilton*," the preceding Walter,) of the lands of Ballincrief, &c. which is also witnessed by "Dominus David filius Walteri dicti de Hamilton." This last David was the eldest brother of John, and after the death of his father Walter, continued the Hamilton line. He evidently was the third Hamilton representative, and not of "the second generation," as might follow from an allusion to him by Mr. Innes, in his Preface to the Chartulary of Glasgow, (*ibid.* p. xxxviii.) The preceding John, the disponee in the charter 1369, was the ancestor of the Hamiltons of Innerwick, an old and distinguished branch of the Hamiltons. The noble family of Haddington, representatives again of the Hamiltons of Orchardfield, Bathgate, and Priestfield, as they have been alternately designed, are generally said to be descended of Innerwick, but as no specific line of descent has been thus traced for them, the point has been questioned even by Crawford, the peerage writer, in a MS. in the Advocates' Library. In this emergency I may add the following evidence corroborative of the Innerwick connection and descent. Grant in 1524, (in the Privy Seal Register,) of their marriage to Thomas Hamilton, sone and heir of umquhile Maister Thomas Hamilton of Bathgate, whom failing "be deceis unmarreit," to his heir whatsomever. Letter (*ibid.* in the same year,) to "Barbara, Margaret, and Janet Hamilton, dochteris of umquhile Maister Thomas Hamilton of Bathgate," with liberty to them "to dispone upon thair lands," as shall be thought expedient to *James*,

Corroboratory proof of the descent of the noble family of Haddington from the Hamiltons of Innerwick.

mystification, incapable of conceiving in what corner of the Chartulary the chief authentic Hamilton treasures, illustrating their early origin, were concealed. But stay, I have been too hasty, I beg pardon of Mr. Innes, there *is* an *older* entry there—but only *one other*, I am sure,—regarding a Hameldun or Hamilton, in the person of a "Gilbert de Hameldun," who witnesses a confirmation of the Church of Cragyn to Paisley, in 1272. This is even anterior to that in the Ragman Roll. This is indisputably what the learned gentleman must have in view, as curiously illustrating and authenticating the Hamilton origin, which, no doubt, it may in one way. But pray what is that *unseemly little word* that clings like a catterpillar to the bud of so much promise, and infects his name—CLERICUS—A CHURCHMAN! This is indeed *sad*, and besides, he is but a very secondary clerical person figuring in the wake, with only another *clericus* or monk, *after* a vicar, two chaplains and rector, while those still desperately rivet him to clerical celibacy.* We may, indeed, apply here, *mutatis mutandis*, the comment of Lord Hailes upon a corresponding attempt formerly to attach an earlier ancestor, to the Stewarts in an obscure Alden—or Alan as he was changed into, witnessing, as *Stewart* merely of *Earl Gospatrick*, an early grant of the latter after "Andrew the *Archdeacon*, Adam his brother, Nigel the chaplain, Ketel the son of Dolphin," &c. "Is it possible for credulity itself to believe that the Alden, placed so *low* in *such* company, was the High Stewart of Scot-

The information alluded to, only unduly Bastardizes the Hamiltons.

Earl of Arran, (head of the house of Hamilton,) and *James Hamilton of Innerwick*, their "*nearest friendis*." Friends often then denoted relatives, who would here naturally be consulted, so that this suits well with the descent in question. Edict of curatory "at ye instance of *Thomas Hamilton*, sone and aperand are to Thomas Hamilton of Priestfield," *minor*, whereby he summons for their interest, on his election of curators, Alexander Hamilton of *Innerwick*, and Mr. John Hamilton, as "*nearest* of kyn on ye *fayer* syde," with James Heriot of Trabroun, and Alexander Cockburn of Woodhead, on the mother's side, (Act and Decree Register of Commissary Court of Edinburgh.) The minor was afterwards the distinguished President of the Court of Session, and first Earl of Haddington, &c. It is to be observed that while there were no *female* alliances at the time as yet discovered between the families of Innerwick and Priestfield, pure agnates or heirs-male, by our old practice, were preferably *thus* cited on the father's side.

* The testing clause of the deed of Confirmation of Cragyn in 1272, is literally as follows:—"his testibus domino Walter Senescallo Comite de Menteth, domino Symone *vicario* de Innerkip, domino David *capellano* de Nigra aula, domino Mauricio *capellano* de Passelet, Lamberto *rectore* ecclesie de Dunhon, *Gilberto de Hameldun* CLERICO, Willielmo Logan clerico." Printed Chartulary of Paisley, ps. 232–3. Sir Alexander Stewart of Scotland figures separately in the body of the deed.

land, a man at least as honourable as Gospatrick himself."* We may clearly ask the same question in reference to the conclusion of Gilbertus Hamilton, *clericus*, placed in the exact situation *among* equally low co-subscribers, being ancestor of the Hamiltons. So it, alas, turns out that the invaluable original evidence, the *chief* and most *authentic* of the Hamilton origin or early descent, which Mr. Innes has found in the treasures of the Paisley Chartulary, (for there is none other there that can be tortured to such bent,) only proves the illustrious House of Hamilton to be the spurious issue of an obscure Priest, or as we ignominiously termed such, *Priest-gets*!†

Such honours may the first Scottish Family in rank inevitably receive at the hand of Mr. Innes in his Chartularian Prefaces. No doubt Douglas, the Peerage writer, dubbing and Baronizing the Monk with *all* honours, makes him the Hamilton ancestor;‡ but Scotch Peerage writers, (whom Chalmers

Specimen of Scotch Peerage Writers; and how an obscure monk called Hamilton, in 1272, can be remoulded and exalted at their hands.

* See his Remarks on "the *Origin* of the House of Stewart." Annals, Edit. 1797, Vol. iii. p. 55-6. Lord Hailes also attempted to explore this subject, something like the source of the Nile among Scotch Antiquaries, to which he devoted an article in the shape of these remarks, but singularly, he was only able to remove and clear away "tradition" and the usual Scotch obstructing rubbish.

† Or rather "Priest-gietts." Bishop Keith remarks, that John Knox in his History calls Lesley, Bishop of Ross, in the time of Queen Mary, "a Priest's-giett,"—i. e. (he explains,) "the spurious bastard of a Priest,"—which truly the Bishop was. See Keith's Bishops, p. 115.

‡ As fixed by the following relative entry in his Peerage, in the course of the Ducal Hamilton Pedigree,—"William, *third son of* Robert, *third Earl of Leicester*, (my readers must not be surprised at this *fresh ingrafting* upon the stem, for such is no unusual *prelude* with him,)—came to Scotland about the year 1215, to visit his sister, the Countess of *Winton* AND *Winchester*, (pretty well, Master Douglas redundantly making *much* of every invention,) was well received by Alexander II, who conferred many favours on him. He married Mary, daughter and *heiress* of Gilbert Earl of Strathearn, *(good again)* a lady of the first rank and quality in the kingdom, by whom *he had a son*, SIR *Gilbert*, who *succeeded him*, and *of whom* ALL *the Hamiltons* in *Scotland are descended*, &c.—In a *charter of confirmation* of the *church* of *Cragyn*, to the Monastery of *Paisley*, *Gilbertus de Hambleton*, Walterus Senescallus Scotie Comes de Meneteth, &c. are witnesses, *in* 1272, &c. See Douglas's Peerage, first edit. p. 327. This is the *identical Paisley charter* in that year I have noticed, being referred to here by Douglas, both as in the Chartulary of Paisley, and as the sole proof for this transcendant Sir Gilbert Hamilton, the ancestor of all the Hamiltons, but plainly speaking, no *other* than the *Monk;* though he chooses to omit his style of *clericus;* while for the grander effect, he equally absurdly and falsely clubs Walter Stewart, Earl of Meneteth, into the Stewart of Scotland. (For the true testing clause, see p. 75. *n.*) Such are our Scotch Peerage writers, whom yet I have known, Scoto-Anglo solicitors use as their only authority, for statements of pedigrees in Peerage claims before the House of Lords.

even identifies with fiction,) * are most treacherous persons and not to be trusted. He must seal his ears against such Sirens—as also the compilers of the new Genealogical Work reviewed in the last Quarterly.† Leaving Mr. Innes to settle the above matter with the members of the noble Houses of Hamilton, whom it more immediately concerns, I must next ask, how even could the previous intimation of *Gilbertus de Hameldun* the obscure *clericus* in 1272, though admitting him to have been a laic and distinguished—be the earliest of the surname, as we must necessarily conclude with the learned gentlemān, when in *his* edition of the Chartulary of Melrose, there are two charters, so far back as the reigns of William the Lyon and Alexander II, —that is from 1166 to 1214, and from 1214 to 1249—thus far anterior to any Paisley Hamilton notice, which are respectively witnessed—the oldest by " Thoma de *Homeldun*, et Rogero filio ejus,‡ and the later by " Roberto de Hameldun," and " Rogero de Hameldun,"‖ as to which last hereafter. With respect to the true origin of the Hamilton family, it has, however, like most Scotch ones, been veiled in fable, nay, falsified by " *tradition*," which yet is to be received, in evidence in the new genealogical work, alluded to in the last number of the Quarterly. The tradition concerning Sir Gilbert Hamilton, the English Knight, and supposed Hamilton founder, having fled to Scotland, owing to rather an un-English and unlikely act, *during* the reign of Edward II, having then fully got Cadzow, and been a mighty hero, and knighted at Bannockburn,§ &c. are all ideal, as much so as his, or the vaunted Hamilton descent from the English Earls of Leicester, which can be refuted by the strictest legal evidence. Walter, and not " *Sir* Gilbert," certainly, or even " Gilbert Hamilton," (however the latter be his real father,) was the head of the family in the reign of Edward II, indeed previously in that of Edward I. He was the first Hamilton who distinguished himself, and first *acquired* the interest not originally feudal, in Cadzow, ¶ styled Hamilton, as can be further legally fixed. The surname of

Origin of the Hamilton Family.

* See Caledonia, Vol. i, p. 556.

† See p. 41.

‡ Chartulary, Vol. 1, ps. 107-9.

‖ Ibid. ps. 267-9.

§ See Crawford's Peerage, ps. 186-7.

¶ The Hamiltons originally leased Cadzow, a Royal Park of the Crown, though they afterwards feudally held it.

Hameldun, as has been shewn, is much earlier than the time of the fictitious Sir Gilbert, or true Walter Fitz-Gilbert, being traced through the Chartulary of Melrose from the reign of William the Lyon, down to that of Alexander II, who died in 1249, when we meet with Robert, and Roger de Hamelduns. I conceive this Roger *may* possibly have been the cotemporary of the same name, who figures in this excerpt from Burton's "Monasticon Eboracense," relative to the right of the Abbey of Whitby, Yorkshire, to parts of Oxenham." "*Oxenham*, Alan, son of Alan de Perci,* gave one carucate here; (Gaufrid de Perci, another), confirmed by Malcom, King of Scotland, and by Henry de Perci, brother of Gaufrid, and by David, King of Scotland, and by Philip de Colevile, and *Roger de Hameldun*, quit claimed to John Abbot of Whitby, all his right herein."† John, Abbot of Whitby, is shewn by the same Monasticon to have been elected Abbot in 1245‡—that is in the identical reign of Alexander II, which makes the above Roger de Hameldun a cotemporary with the Roger de Hameldun in the Melrose Chartulary. The property of Oxenham, afterwards, as can be proved, possessed by the Scotch Colvilles, also mentioned above, lay in Roxburghshire. Indeed it is further coincidental, that the first Melrose charter referred to during King William's reign, and witnessed by Thomas de Hameldun, and *Roger* his *son*, though it does not prove any possessions by them, yet relates to the lands of Clifton and others, in the same county. Thus Hamiltons have been attached to the latter, but more especially by means of the transaction in Burton's Monasticon, which proves their first possession in Scotland, in the person of Roger de Hameldon, to have been *Oxenham*, in Roxburghshire, as early as the reign of Alexander II, though he quit claimed it; the family may have gone afterwards into the interior. But we have now at least got a high antiquity for "Hameldun" with us, honestly come at, much above what has been so contorteously and inadequately strained—to say the least of it—from the Paisley Chartulary. So far from being productive, and giving the *chief* and *authentic* aid, as we were led to expect, in clearing and illustrating the *early* Hamilton descent, that Register, alas! has

The surname older in Scotland than represented.

* A branch of the Percys had then settled in Roxburghshire, though their line afterwards failed.—See Chalmers' Caledonia, Vol. I. pp. 508-9.

† Published in 1758, p. 74. ‡ *Ibid.* p. 80.

proved directly the reverse! But I sincerely hope Mr. Innes may be able to console himself under this disappointment—in the sad evanescence of his once gladdening "Passeletensian" treasure—though

> "Mox ubi *fugerunt elusam gaudia mentem*
> *Veraque* forma *redit*, animus *quod perdidit optat*,
> Atque *in præterita* se *totus imagine versat*."

Likely origin of the Hamilton.

I am not altogether fond of birth-brieves, yet I cannot, in the dearth and poverty of relative evidence, refrain from here appealing to one by Charles II, in May 1683, upon record, in favour of James Hamilton, a son of Sir Alexander Hamilton, younger son again of James first Earl of Abercorn, direct ancestor of the family of Abercorn, now the heirs-male of the house of Hamilton. However partially faulty, it has yet the good sense wholly to omit the fable of the *English* Gilbertine Knight as an exile in the reign of Edward II, and makes the Gilbert father of Walter, the acquirer of Machan, and of the interest in Cadzow, in the reign of Robert I, to have been the *grandson* of a *previous English* Hamilton, who *first* "cum consanguineo suo Roberto Bruce dicti nobilis Regis Roberti (Robert I.) *avo* in Scotiam ex Anglia commigravit," and thus founded the house of Hamilton.

This earlier origin seems, it must be confessed, rather likely making certain allowances, and quadrates with the first intimation of the Hamiltons in the Chartulary of Melrose, or rather in Burton's *Monasticon Eboracense*. The above is all we can safely say of the Hamilton origin, *in hoc statu*—of course steering clear of the rock or quicksand of the Paisley monk, upon whom it is to be hoped Mr. Innes will hereafter lay a strict embargo, in the want of any proper evidence certainly of his being the Hamilton patriarch. I find the following in a communication, 9th of June 1543, of Sir Ralph Sadler, among his State Papers, in reference to the Regent or Governor, Chatelherault, Earl of Arran, the then head of the Hamiltons,—"They say he must needs be a good Englishman, for his ancestors were Englishmen. As, indeed, the governour himself hath told me divers times, that his *ancestors* came out of England, and that he is come of the *Hamptons* in England; and also he saith that he is the King's Majesty's poor kinsman."* This appears to be a

* See Sadler's State Papers, edited by Scott, Vol. I. p. 216.

repetition of the fable or *tradition* (of which we again see the weight) in what is called " Ffrier Mark Hamiltonis Histtorie," a monkish legend annexed to a partial copy of the Chartulary of Glasgow in the Advocates' Library, in the handwriting of the earlier part of the 16th century, who makes the Hamilton ancestor the *redoubtable* Gilbert " Gilbert Hamptoune," " Phillippe *Hamptoune*, *Erll* of South Hamptoune's apperand air and eldest sonne !" I need hardly add, that this is palpably a fable, there being no such noble family of the name of Hamptoune (strangely attempted to be identified with Hamilton) in England, far less Earls of South Hamptoune ; nor would their heir or heirs in any likelihood be induced to exchange an Earldom there, as admitting the fable, they must have done, and abjure all their solid English prospects, and great connections, for the barren contingency of Scotland. The whole has been vamped up by a clerical dependant to flatter the conceit of one of the weak heads of the family. Laying all things together, however, we may conclude, that the Hamiltons, before the era of the visionary *Sir* Gilbert, came from England, like many other Scotch families.*

Highland MSS. I have too often found, in the course of my investigations to be treacherous and deceitful authorities, but at any rate I would almost as soon commit suicide as quote them in evidence of any fact or occurrences in the Lowlands. Yet I see in the same Preface to the Chartulary of Paisley, Mr. Innes has quoted, not even the original, but a copy merely, of one in the 17th century *penes* a Macdonald of Knock, to prove a material fact, (as he inculcates,) that John, Earl of Ross, last Lord of the Isles, (who certainly did *not* then hold these titles,) had concluded his life, " by retiring into the Monastery of Paisley, where he died in 1498, directing his body to be buried beside King Robert."† The latter is not a very likely incident, seeing he had been utterly despoiled and stript of all his possessions, by Robert's descendants and representatives. The copy of the late Highland MS. in question, which Mr. Innes would seem to have been forced to adduce in the dearth of better materials, *is aliundé*, quite unsupported. The following authentic notices of the ex-Insular Po-

Account of John, last Lord of the Isles, in a copy of a Highland MS. in the 17th century, founded upon by Mr. Innes.

* As for the fact of the cinque-foils in their arms, being borne also by the Earls of Leicester, that is immaterial; other distinct families likewise in England bear them, and it might easily have been by vassalage, and agreeably to feudal usage.

† P. xv.

tentate,—the *last* I can recover,—may not perhaps be held to countenance the notion.

Original and last authentic notices of him.

Notarial Instrument, dated January 2d, 1492, setting forth that then "Johannes *olim* Dominus *de Ilis*, non vi, &c. accessit ad presentiam supremi domini nostri Regis Jacobi quarti,—Reverentia qua decuit flexis genibus," (and) "*resignavit* &c. *totum Dominium* de Ilis, cum tenentibus et tenandriis, &c. pro se et heredibus suis &c. in *favorem dicti domini* Regis, &c.—Testibus Episcopo Orcadiense Comite de Ergill, &c.*—Original Exchequer Roll, respecting the Customs, &c. for the terms from the 16th of September 1497, to last of June 1498, and bearing under the *expense*, "*solutionem* factam *ad expensas Johannis olim domini Insularum*, pro *sua sustentatione*, *et servitorum* eiusdem, ut patet per *literas* dicti Rotulatoris, ex parte domini regis, de data vicesimi sexti Februarii (1496,) per receptionem Patricii hume de fastcastell, de ducentis marcis, cum quo componendus est, dicto rotulatori presente, et faciente preceptum suum, sub periculo computantis, cxxxiv^{li} vi, viii."†

Under the latter authority, we have the party pretty well down to 1498; for the date in 1496 is merely the warrant of indefinite payment, and he was then obviously, as we may conclude, a State Prisoner, under the especial surveilance of Government, who certainly alone supported him. While there is no allusion to Paisley, whose necessary sustentation on the other hand, of John, now needy and destitute, would have superseded the above, both King and Government would doubtless keep him in strict and *close* custody, though of course with decent attendance, and not allow so important a person to resort to the distant Abbey of Paisley, from whence he *might* have *easily* escaped to his former not very remote possessions, and have again excited insurrections and rebellion, for their recovery. The above new authorities may also be material in proving how completely John of the Isles,—the *ci-devant* Earl of Ross, &c.—but now only plain John, without any surname or property,—had denuded himself and his heirs of his patrimony, and how fully all that was once *Insularily* in him, had come,—as must now legally be presumed, to vest in Government by his own special act, independently of forfeiture,—a point I know that has been questioned.

* Acta Dominorum Consilii of that date, in her Majesty's General Register House, Edinburgh.

† *Ibid.*

The origins of the Houses of Stewart and Douglas, agreeably to Mr. Chalmers, Mr. Innes views complacently, with hardly a dubious glance at the Douglas theory, as it yet merited,—holding accordingly, that the Douglasses were descended from a settler and granter upon Douglas Water.* He thus,—personifying these subjects,—hardly takes them out of their niches, far less brushes the cobwebs from them, or symmetrizes or modifies any of their proportions. To use a Scotch legal phrase, he is here guilty of no intromissions good or bad. But with the Douglasses *otherwise*, —" some demon prompted, or some fury sped,"—for they again, no more than the Hamiltons, are to escape " skaithless" at his hands; he has been here guilty of a terrible intromission, and has cooly BASTARDIZED the yet lawful representative in the 14th century, of the purest and most immaculate branch of the House of Douglas,†—and that no less a personage than Sir William Douglas, Knight of Liddesdale, the " Flower of Chivalry,"—him whose male representative, James Douglas, Earl of Morton, Lord Dalkeith, &c. is declared in a legal process in 1542, before the Supreme Civil Court, to be " one of ye maist noble Baronys of ye realme."‡ Sir William Douglas, I need hardly mention, was a most important public character, and chivalrous Hero in his day, who instead of being then fated to be degraded, as now, was on all hands exalted, at least fully secured, according to his innate lawful status, in the succession to the possessions of the main line of the house of Douglas, immediately failing William, first Earl of Douglas, and the heirs-male of his body, as will be shortly proved. But it seems his bright descent is all a fable, and we are mistaken. In the Chartulary of Glasgow, recently edited by Mr. Innes, there is a grant by " Willielmus de Douglas, dominus Vallis de Lydel,"—the identical person in question—without date, but safely enough said by him to be in David the Second's reign‖, of a carucate of land in " parva Nudref," to the Church of Glasgow, that is witnessed by " Dominis Andrea de Douglas, et Willielmo de Douglas militibus;"§ and whom Mr. Innes actually represents as but a bastard son of

Mr. Innes in his genealogical lucubrations unduly bastardizes also Sir William Douglas's of Liddisdale and Dalkeith lawful representative of the purest branch of the House of Douglas.

* See his Preface to the Chartulary of Moray, ps. xxxi, xxxii, *n*.

† Owing to certain known objections that came subsequently to attach to the status of the main stock of Douglas.

‡ Act and Decree Register of the Supreme Civil Court.

‖ Preface to the Chartulary of Glasgow, p. xxxviii.

§ See same Chartulary ps. 253-4.

the "good" Sir James Douglas, who carried Robert Bruce's heart to be deposited in the Holy Sepulchre! His words are—as usually quite unaccompanied by any authority—while clearly indicative of the little enquiry he had made into the matter,—"The *granter* (of the Nudref carucate, the above *Sir William* &c.) I *suppose* to be *the bastard son of* good Sir James of Douglas!"* I may observe by the way, that all mere supposition should be entirely banished from genealogy; it is a stern and impracticable subject to deal with, neither susceptible of fancy, poetry, nay even of the noblest flights of the imagination. But in certain exposition of the error, I have only to cite the authorities and evidence given in the Appendix, fully establishing the true immaculate descent of the "Flower:"† and if I be tedious and irksome in so doing, I am afraid that here, as well as *not unfrequently* elsewhere, the blame cannot be attributed to me, but to Mr. Innes, justly to correct whose hasty and glaring mistake I have been *ex necessitate* dragged into this infliction. Sir William Douglas of Liddisdale, the "Flower of Chivalry," was clearly, as will be seen by the former, heir-male and representative of the great *distinct* branch of the Douglasses, "de Laudonia," or in Mid-Lothian, where their estates lay, through his father, Sir James Douglas "de *Laudonia*," so called to distinguish him from his cotemporary the above "good Sir James" Douglas of Douglas,—whose bastard he is nevertheless said to be by Mr. Innes.‡ Sir William himself, moreover, first acquired the Barony of Dalkeith in the same district, which became the leading designation of the family in the persons of his heirs, who were subsequently raised to the title of Earl of Morton; and of whom the present possessor of that honour is descended.‖ The charge of bastardy

True parentage of the above Sir William Douglas, 'the flower of chivalry.'

* Preface to the said Chartulary, p. xxxviii.

† See Appendix No. III. under which they are adduced.

‡ What may have been the origin of the mistake is of little importance; it may be only added, that there was also William Douglas "of Nidisdale," a distinguished person, who figured later in the same century, certainly a natural son, but of Archibald Lord of Galloway, who was himself natural son again of the good Sir James. This William left female issue, and in respect to him, see Fordun and the Public Records.

‖ The same Douglasses of "*de Laudonia*," Lidisdale and Dalkeith, &c. though in the 14th century a distinct stock from that of Douglas of Douglas, in Lanarkshire, of whom "the good Sir James" was the representative at the commencement, yet in every probability sprung from them previously in the 13th. There is a valid charter by David II, dated May 29th, 1342, of the Douglas estates, proceeding upon the resignation of "*Hugo* de Douglas, *dominus ejusdem, frater* et *hæres* quondam *Jacobi*

by Mr. Innes in this instance, is more pointed and explicit than in that of Hamilton, and must doubtless terrify and commove all the Douglasses " of *Dalkeith*." People feel some terror, " paries cum proximus ardet"—it *may* be with them " proximus urit Ucalegon," —for hence, in like manner, if the chief and more distinguished member of a race such as " the Flower," be singed, nay, be actually branded by the flagrant imputation of bastardy, it may

Curious original Settlement of the Douglas Estates in 1342.

domini de Douglas," (the *good* Sir *James*), on the 26th of the said month, " in nostra presentia et plurium Prelatorum Regni nostri apud Aberdeen," whereby they are limited, by reason of the loyalty, merits, and deserts, &c. of the said Sir James, " *Willielmo* de Douglas, *filio* et *heredi* quondam *Archibaldi* de douglas militis *fratris* ejusdem *quondam Jacobi*—et heredibus suis masculis de corpore suo legitime procreandis ;—quo Willielmo, et heredibus suis masculis de corpore suo procreandis in fata decedentibus, &c. volumus et concedimus, (the King says,) quod *Willielmus* de douglas *miles* dominus *Vallis de lidal,* (thus the *Knight of Lidisdale*), cujus labores et merita nobis et regno nostro multipliciter profuisse sentimus, omnes terras et tenementa predicta cum omni jure hereditario &c.—pro se et heredibus suis masculis de corpore suo legitime procreatis seu procreandis, habeat teneat" &c. Here the Knight of Lidisdale just takes as next collateral heir-male, upon the failure of the direct male stock in the person of William son of Archibald Douglas, afterwards Earl of Douglas, and his male issue, in support of his conceived descent, as premised. And it is especially to be added, that failing him and his male issue, (as happened), the next substitution is in favour of " Archibaldus de Douglas FILIUS *dicti quondam Jacobi domini de Douglas*, (still the good Sir James)—et heredibus suis masculis de corpore suo." The latter Archibald, afterwards Lord of Galloway, could only well be natural son of Sir James, from the context,—a fact, besides that can be fully established. He was truly his *only* spurious offspring; but supposing that such visionary *status* had attached also to the Knight of Lidisdale, then indubitably alive, can it for a moment be pretended, that in this same deed, where both are mentioned, it would not have been specified too in his instance—as it clearly is not—in the same way as in Archibald's ? There can, upon such hypothesis, be no reason for the striking discrepances in their description, which can solely be explained, by the Knight being of different extraction, and lawful son and heir of Sir James Douglas of Laudonia, as is fully fixed in the Appendix under No. III. We have, by the above charter, also legal proof of the " good Sir James " having had two younger brothers, Hugh and Archibald, who in the circumstances, and from the limitations, must be presumed his only ones. This, taken with the fact, as proved too (*ib.* under No. III,) of the Knight of Lidisdale having had, subsequent to 1342, an uncle *Andrew*, and a natural brother, *William*, further excludes the notion of the said Sir James—as Mr. Innes contends—being his father; because this last would have had then necessarily an additional brother, and natural son, respectively of the names of Andrew and William, which has been disproved in the case of the former, and never heard of in reference to the latter. Nay, as will be seen by my evidence in the Appendix, besides these aggravated and unmerited immoral imputations, Sir James would have had the whole Douglasses of Dalkeith &c. unaccountably fastened upon him. With respect to the striking fact of the murder, in 1353, of the Knight of Lidisdale by William first Earl of Douglas, who took immediately before him in the charter 1342, I have not space at present for the discussion; but the charter evidently supports the received account of the Douglasses of Lidisdale or Dalkeith being collateral heirs-male of the main stock of Douglas.

naturally extend to the others, including the present noble family of Morton, descended from his nephew, involving all in one common ruin. If it turn out that the Knight of Lidisdale—who certainly was chief, and preferable in the Dalkeith—subsequently Morton representation—was bastard and spurious, *a fortiori* perhaps, but at least with as much reason, may the former be likewise. Mr. Innes may possibly say in exculpation, I am not to blame for this most unfortunate charge, of which I now most heartily wash my hands. I was misled by Hume of Godscroft, in his History of the House of Douglas, who positively gives "the Flower" the descent I stated.* To which we may reply, (1.) Hume's evidence is merely historical, not of ancient date; an accurate and searching antiquary would by no means be contented therewith; he would have probed the Publick Records and the best sources of information; which, if Mr. Innes had done, he would speedily have discovered the truth, (not here lying in a well) after no very protracted enquiry; while, further, if he had merely glanced at Ruddiman's edition of Hume, he would have found that that accurate and painstaking person, so far from here following his author, gives him upon the solid evidence of charters, the flattest and most pointed contradiction, and veraciously vindicates the "Flower's" parentage and status. But (2.) independent of this, how could Mr. Innes rely upon the Douglas Historian, (if he did so, and if not, to what old authority could he else appeal?) when in the Preface to the Chartulary of Moray, he strikingly represents him, for a wonder, when for once stumbling upon the truth in a point, as more "accurate than his *wont*,"—thus inculcating how little he was usually to be trusted—nay, moreover, contemptuously brands him but as "the *gossiping* chronicler of the House of Douglas."† And if, again, he had not Godscroft, or any due affirmative voucher in view, as to which he is silent, things would be still worse, for here to use a vernacular phrase, he must have "been going upon tick" in Genealogy.

Pleas considered by Mr. Innes in extenuation of his mistake.

Notwithstanding my utmost exertions, I am utterly unable to

* See "History of the House and Race of Douglas and Angus."—Ruddiman's Edit. Vol. I, p. 115, where Hume does make the Knight of Lidisdale "natural son" of the good Sir James, though Ruddiman, at the same time, here pointedly corrects him, in a note, justly adding, that "*He* (the *Knight*) is not son to James the good Lord Douglas, but son *lawful* to *James Douglas de Laudonia*,"—for which he properly appeals to the relevant evidence of "*charters*."—*Ibid.*

† Preface to Chartulary of Moray, p. xlvi.

bring Mr. Innes out of the dilemma in which he has placed himself, by overlooking those only true beacons, legal proof and fact, as in the equally unfortunate case of the fourth degree of consanguinity.* I cannot well rescue him with eclat, out of the treacherous quicksands where he has in consequence been stranded—though strangely, so far as I can see, insensible of his situation and danger in both instances.

I must now confess, while there has been in reality undue detractions from the status of two of our noblest families, the Hamiltons and Douglasses, that I have been sadly disappointed in not being edified as I expected, or reaping more benefit by Mr. Innes's expositions of his favourite and captivating pursuit, where it may indeed be admitted there is but little curious or original, if the latter term be applicable.

The circumstance of William, son of William Earl of Sutherland, having been styled "*de Murref*," in 1367, with the inductive and relative ancestry he notices in his Preface to the Chartulary of Moray, (which we may next discuss, as comprising a district especially familiar to him,) chiefly transpire from Lord Hailes's Sutherland case and Caledonia,† coupled with the former. There is no small periphrasis and parade of illustration by Mr. Innes, in the said Preface, about *certain* Murrays *only*, including those of Tullibardin or Athol, rather irrelevantly started —"much cry," it may be said, "with but little wool;" while all redounds to the honour and glory of the house of Sutherland, *qua Murrays per excellentiam*, who are most gratuitously elevated to a dizzy *apex*, that may prove too high for them, and from which they may lucklessly tople down. The learned gentleman's attempt to connect the Murrays of Tullibardin with the latter, and the great house of the Murrays of Bothwell, Panetarii *Scotie*,‡ upon which he has expended nearly four pages,‖ as will be discovered at the first glance, is indeed most lame and impotent. This is even obvious from his himself admitting, *while* he flatters himself his evidence *may* be here "conclusive," that there still *remains behind*—the *new difficult* question—"at what *point* they

Ancient Family of Moravia or Murray. Their chief representation unduly given by Mr. Innes to the House of Sutherland, in exclusion of the house of Bothwell, with other undue and gratuitous assumptions of the learned gentleman.

* See ps. 44–5.

† See Sutherland Case, p. 11, and Caledonia, Vol. I, ps. 604-5, *et seq.*

‡ Masters of the Household, though, from the term, the office would seem more limited. In France the officiary was styled "Magnus *Pistor* seu Panetarius Franciæ." —See Du Cange sub *voce Panetarius*. It has been with us rendered "*Pantrieman*."

‖ From p. xl to p. xliii of his Preface to the Chartulary of Moray.

branched of?"* Why, in this latter regard exclusively, may be said to lie the whole soul of the business; and this curiously strained distinction reminds one of the complacent or exulting proposition of a *Leguleius*, in a matter of pedigree, that *all* had been made out *but* a *link*—only that in the previous instance the irrelevancy and anomaly may be the more glaring, there being not one link, but *more* to rivet.†

Proceeding, however, to what is more relevant, and what first deserves our attention—upon what evidence, I must ask, does Mr. Innes give the Chieftaincy, and seniority, quite absolutely and unqualifiedly to the Earls of Sutherland, in their *de Moravia* capacity, over the distinguished house of the Murrays of Bothwell? Indeed we may here again find the contrary solution of the question, even from his own shewing. He admits that *Friskin*, (dead before 1171), the ultimate root and *ancestor* of the "de Moravias" or Murrays, possessed Strabrock and Duffus, with a considerable Moray property, and that *these identical lands* were held by, and confirmed to his son *William*,‡ the Bothwell ancestor;‖ while it is clear none of the said Friskin's estate devolved to Hugh, his other son, the founder of the line of Sutherland. In these circumstances, I submit to any lawyer, is not the legal presumption of seniority and heirship *in re tam antiqua* here, in favour of William and his descendants, who were also styled "*Domini de Moravia*," as indeed elsewhere has been represented;§ and that

* "If the evidence, (the *talis* qualis he adduces), that the Murrays of Athole sprang from the northern stock, *be held conclusive*, the *new* difficulty *remains behind, at what* point they branched of."—*Ib.* p. xliii. Of course no disparagement is designed to the *individual* Tullibardin or Athole pedigree, which is ancient and baronial. I only contend that the noble family in question are not as yet proved to be connected with the previous Murrays or Moravia-Sutherlands, as *cadets* merely, as must indubitably follow from Mr. Innes's premises.

† Even the link between John *de Morauia*, the first Perthshire ancestor of the House of Tullibardin, and Malcom, the next, in the reign of Alexander III, is not, by Mr. Innes's admission, fixed.—See Pref. *ut sup.* p. xl.

‡ *Ib.* pp. xxxi-xxxiv. I have besides seen proof of this elsewhere.

‖ This William had other male descendants besides the Family of Bothwell and *Petty*, (which they also held,) whom it is unnecessary to notice, as they all failed in the male line, in the reign of Alexander III, when the male representation of William fully vested in the former.

§ The Murrays of Bothwell, as is well known, clearly possessed the Lands of Petty, in the north, and in an Exchequer Roll from February 1455, to September 1456, there is mention of the Chaplainry of Holy Cross, in the Cathedral of Elgin, founded by revenues out of the above property, "per quondam *dominum de Moravia*," in other words, the Head or Ancestor of the Family of Bothwell.

Hugh, standing thus quite isolatedly, in respect to the Moray *patrimony*—having none thereof—being like a younger son, quite "*artifex fortunæ suæ*," and acquiring, or "conquesting," as we would call it, the fief of Sutherland, and lands in such different quarter—that constituted his *sole* possessions—should never, as Mr. Innes has yet gratuitously done—for, as usual, he appeals to no evidence in favour of his conclusion—have been repeatedly placed as he is, in the succession and pedigree before the former.*

Further still, he as unqualifiedly makes John Murray of Drumsargard, the ancestor of the Abercairney family, undoubted younger son of Andrew Murray of Bothwell, who was slain in 1297.† Again, I must ask, what proper proof has the learned gentleman for this—he, as above, referring to none? I suspect he will have some difficulty in finding it. He will solely be enabled to quote the *dicta* of the Scotch Peerage and pedigree mongers, or such kind of secondary and inadmissible testimony; and so inconsistent and miserable is it in this instance, that Douglas, one of these, whose *dexterity* and *fancy* have been already pourtrayed in the case of the monkish ancestor of the Hamiltons,‡ at one time, with the usual embellishments, makes Sir *John a* younger *son* of Sir Andrew Murray of Bothwell, the first Abercairney ancestor;‖ but elsewhere, as confidently, *a* Sir *William* Murray in the *same* capacity.§ It has been said in pedigree, not unjustly, that when a person is stated to be a descendant, *either* of such an ancestor, or of *another*,—he is *neither*; and such conclusion here, *qua the sons* of Bothwell, combined with the complete want of relevant evidence upon the point, may obtain. I must, indeed, decidedly protest against this practice of absolutely assuming, in a mere matter of fact, what is in reality untenable, inasmuch as being destitute of present probation; and upon such *notable* basis, of unduly foisting certain families into a pedigree, in prejudice of others—as further may hold in this instance—who may be equally entitled to the honour. However

* See Pref. *ut sup.* pp. xxxii-xxxix. Hugh's *sole* Sutherland possession, is clear.

† His words are, "He, (the said *Andrew,*) left *two* sons, of whom John the younger was ancestor of the de Moravias of Drumsargard and Abercairny." Pref. *ut sup.* p. xxxviii.

‡ See. p. 76. ‖ See Peerage, first Edit. p. 81.

§ See Baronage, p. 98-99. Neither are John's or William's filiation fixed.

Mr. Innes may in effect set forth the contrary,* the only tangible evidence, as far as yet shewn, of the Abercairney Bothwell connection, through the preceding *John, or William*—both as yet *unaffiliated*—is the circumstance of the Abercairneys having possessed Drumshargard, that lay contiguous to, and is represented as having been within the barony of Bothwell; from whence it is concluded, that it must have been given off in appanage to one of the former, as a younger son, which, *therefore*, one or other *must* have been. But without any disparagement to the Abercairney family, who are of themselves ancient and distinguished, (having produced too an Earl of Strathern), or to such likely argument from the conceived appanage, still this may not *per se*, suffice.† We have not here, over and above, the "filius Alani" demonstration, and others, in the case of the Stewart origin. More yet remains to be done. And it is especially observable, that this very argument of appanage holds also in the case of another respectable and ancient Moravian or Murray stock—the Murrays of Touchadam and Polmaise—whom with *remaining* Murrays still—though certainly entitled to due consideration and competition—Mr. Innes, either from want of proper information, or his being absorbed too much in the Sutherland, Tullibardin, and Abercairney interests, does not deign to notice. This, therefore, is an omission that requires to be remedied and supplied—which I shall attempt to do in the special instance alluded to, so far as I may be enabled.

It can be fully proved, by public and private records, that the

* With respect to the pedigree of the Murrays he has given, he says, "There cannot *be any doubt* with regard to the *general* line of *each*, (the *great branches*,) and their *mutual* connexion." Pref. *ut sup.* p. xxxviii. I cannot go along with him here.

† I need hardly allude to another wretched attempt of our Genealogists in favour of this family in regard to the Bothwell origin, through an Indenture dated at Perth in 1375, whereby Eupheme Ross, wife of Robert II, and her son, engage to assist Alexander Murray of Drumshergarth in obtaining the advice of Lawyers "pro *recuperatione* sue *hereditatis*," (see Crawford's Peerage, p. 42,) and from this, it is concluded, that the *inheritance* in question was that of *Bothwell*, to which he hence must have been entitled as heir male, and in fact was so. No doubt Alexander, whose ancestors had different properties, as well as others at the time, might have litigable questions of rights to lands in his view, that he ought to recover; but how does it follow, from the above—which is bound to be shewn—in order to constitute any argument that such "*recuperation*" referred to the Barony of Bothwell—of which there is *not a word* in the Indenture? On the other hand, it had gone regularly by law to Jean or Joanna, the only child and heiress of Thomas Murray of Bothwell, the last of the direct male line, who married Archibald, third Earl of Douglas.

Claim of the Polmaise Family to a Bothwell descent or representation.

Polmaise family, at least four centuries ago, possessed the lands of Wicketshaw, which did lie in, and hold of the Barony of Bothwell,—so that they have thus, too, the *conclusive* Abercairney argument of appanage, all that can be advanced for the latter in the question, in full perfection. But again, trying the Bothwell or Moravian representation by the test of the armorial bearings, this family of Touchadam would at once beat every other competitor out of the field. There could be here adduced in their favour a seal of arms of William Murray of Touchadam, Constable and Keeper of Stirling Castle, appended to an authentic deed as far back as 1463, which exhibits the chief and plain arms of the Morays of Bothwell, that is the three Murray stars with the royal double tressure, quite undifferenced, together with two lions for supporters.* The Earls of Sutherland only acquired the right to this identical tressure by special grant of George II. last century—in addition to *their* stars—which they had not before; and from what we can see, and is transmitted by Nisbet and authorities, it was anciently likewise withheld from the Murrays of Tullibardin and Abercairney, though preferably discussed by Mr. Innes, who besides, did not carry the common Murray bearing, or three stars plain as above, but differenced them in the centre by a chevron.† This argument of arms ought

* The deed is referred to, with a special description of the seal in Nisbet's Heraldry, see new edition, vol. i, p. 249. The same was last century at least, and probably is still, in the Polmaise charter-chest.

† Ibid. ps. 248-250. The fact of such disposition of the chevron has indeed been denied by the family of Abercairney, (see ibid. vol. ii, Append. ps. 110–111;) but without producing counter evidence in refutation, while in the older portion of the Lyon records the century before last, we have the arms of Sir Robert Murray of Abercairney, the then Abercairney representative, given as consisting of a chevron between three stars, with nothing more. Nay, I have seen too, an original document, in 1626, with the seal of arms of William Murray, likewise the then Tullibardin representative, that has the three stars of Murray still without any double tressure, but differenced with two chevrons, in the second and third quarters. It can further be shewn, that neither the Murrays of Tullibadin, or their cadets, *originally* bore the double tressure, but simply, from specimens transmitted, a chevron between the stars. By an old seal referred to by Mr. Innes, they bore merely a Bull passant with a solitary star thereon, (see Pref. *ut sup.* p. xlii.) Subsequently, almost all Murrays, including the latter, assumed this much envied accompaniment of the tressure, greatly facilitated by the *indulgent*, and of course *accessible countenance* of the Lyon office. Hence the *armorial* Murray test must not be derived from modern, but ancient practice. By the singular chance of such adoption, the Tullibardin or Athol arms, including withal the Lions for supporters, *came* to be precisely those of Murray of Touchadam in 1463, and the curious anecdote of the liberties taken by the late Duke of Athol when young, or a boy, igno-

to have every weight with the learned gentleman, for he carries such to a great length, rather sanguinely holding the notion, that a publication of the seals of the House of Douglas—which, however, like every thing of the kind, might be interesting—" would very probably clear up some disputed points, and remove some mistakes in the genealogy of that illustrious house."* I yet conceive upon the whole, that that matter in essentials, is now pretty well ascertained.

With regard to the old respectable family of Polmaise, who have been by no means presuming in their claims, I may add, with the view of further discovery, and possibly elucidating the question of the Bothwell representation, (the Murrays of Bothwell having been *Domini de Moravia*, and at least the most distinguished stock of the name,) that their first ancestor hitherto strictly fixed,† Sir Andrew Murray or " de Moravia " of Touchadam, who must have figured before, as well as after the middle of the 14th century, can be established by authentic public and private documents, to have been likewise designed of *Manuel.* Further, it is remarkable that under such designation, as applied to him, his son Robert is called as a substitute heir in a confirmation of the lands of Ryvale in Annandale, granted the 20th of July 1411, by Archibald Earl of Douglas to Sir Thomas Murray, the direct ancestor of the Earls of Annandale, Viscounts of Annan, &c. in the south. The limitations there are, " Domino Thome *(Murray)* et heredibus suis quibuscunque de corpore suo legitime procreandis, quibus forte deficientibus Gawano filio suo naturali et heredibus suis masculis de corpore suo legitime procreandis, quibus forte deficientibus David de Murray, fratri naturali ejusdem domini Thome, et heredibus masculis ejusdem david de corpore suo legitime procreatis seu procreandis, quibus deficientibus patricio de Murray fratri naturali sepedicti domini Thome, et dicti david, et heredibus masculis ejusdem patricii, et de

rant of the prior and preferable right of Mr. Murray of Touchadam and Polmaise, with the ancient just arms of the latter upon his carriage, is known to some. He unwarily thought in his plot to eraze or expunge them from thence, that he was only exercising the laudable act of vindicating his own, and exposing or punishing usurpation.

* Preface to the Chartulary of Melrose, p. viii.

† It must be here observed, that Douglas, of whose merit as an authentic genealogist we already have had a specimen, foists in, without any authority, a Sir William Murray of Sandford, as the first Touchadam ancestor in the reign of Robert Bruce. (See his Baronage, p. 109.) He must, at least, *in hoc statu*, be discarded, in the utter want of proof, as much I believe as the older fabulous ancestry in the case of the Stewarts.

corpore suo legitime procreatis seu procreandis, quibus, forte deficientibus, (after this influx and exhaustion of near bastards,) *Roberto* de Murray *consanguineo* dicti domini Thome, *filio* quondam *domini Andræ* de *Murray de Manuel* militis, et heredibus ejusdem Roberti masculis de corpore legitime procreatis seu procreandis, quibus forte omnibus prenominatis deficientibus, &c. veris propinquoribus et legitimis heredibus quibuscunque *Patricii* de Murray *patris* predicti Thome," &c.*

Here it will be observed, that Robert, the son of Andrew Murray of Manuel or Touchadam, is *alone* styled "*cousin*," of Sir Thomas, the first grantee; from whence, and his being introduced into the entail, his mother might have been a relative of the knight: for the arms of his family were peculiarly distinct from those of Manuel or Touchadam, they bearing a saltier engrailed with three stars on a chief.† Sir Thomas' lawful male representation may be now dubious, owing to subsequent illegitimacy in his line (where, as has been partly shewn, it remarkably abounded,) besides the direct male extinction of his *de facto* male representatives the Murrays, Earls of Annandale, &c.

The above Murrays of Ryvale or Revel, afterwards of Cockpool, in Dumfriesshire, were originally distinguished and well allied, going back to the beginning of the 14th century. It has been said they were likewise of the House of Bothwell, and if so, though of course this requires probation, their descent might possibly also illustrate that of the other lines. Andrew "de Moravia," of Manuel, certainly acquired by charter in 1368, from the crown, the lands of Tulchadam, and Tulchmaler, in Stirlingshire.‡ It is in proof, that "Thomas Murref," or "de Moravia," as he is commonly simply styled,—who lived down to 1366,—and the Lord of Bothwell,—drew in 1359, the rents of half of the Barony of Crawford-john berclay, "ex concessione *regis (David II,)* quamdiu est *obses* pro rege."‖ He was then, and thereafter, as is well known, one of the hostages for the release of that King, out of captivity in England.§ The above grant was natural, owing to the expence the distinguished hostage incurred in such a charac-

* From the original in the Charter Chest of the Mansfield Family who acquired the estates of this Family. † Proved by old vouchers.

‡ Regist. Dav. II, p. 68, No. 228. We know not how he *got* Manuel.

‖ Printed Chamberlain Rolls, Vol. I, p. 335.

§ See Hailes' Annals, Edit. 1797, Vol. II, pp. 268-9, and also *Rotuli Scotiæ*, downwards. He was first a hostage in 1357.

ter for his Sovereign; and sometime between Martinmas 1357 and 1359, the Sheriff of Stirlingshire in his *Compotum* for that period, " non onerat se," with part of the rents of *Ardhtray*— " quia *in manu, Thomæ de Moravia*, ex permissione Regis."* The party,—still the same Thomas,—as we may conclude, had thus acquired too an interest in Ardhtray,—but it is rather striking, that this relative entry *immediately* follows onerates in respect to the identical lands of " Tulkmaler,"—" *Tulkadam*," (*Tuchadam*,) and " Tulkgorme," all original Stirlingshire crown property, like Ardhtray, and which, as we have seen, with the mere exception of Tulkgorme, were shortly afterwards granted by the King, in 1368, to " Andreæ de Moravia."

This is rather a curious coincidence,—the locality of what thus became the patrimony of Andrew, or the original Manuel owner, being close to that possessed as above, by the Baron of Bothwell, while the former was confirmed in Touchadam in 1368,† shortly after the death of the latter in 1366.‡ Could that grant have been out of any claim, or interest, legal, or equitable, that the stock of Touchadam may have had, as male-heirs of parts of Bothwell, —whether comprising Ardhtray or other lands,—(the bulk of the Bothwell estates going to the preceding Thomas's only child Joanna,)—and which the crown may have disposed of, in the above way. Or did family predilections operate here, either on the part of the grantee, or royal donor? The circumstance might induce some favourable conclusion in the affirmative in either result. There can be no doubt that Andrew, afterwards Sir Andrew de Moravia, the first holder of Touchadam, was a favourite of the then Monarch David II; for there is an earlier grant in 1364, of the lands of Kepmad, also in Stirlingshire, by the Prince to him, as " *armigero nostro*."‖ If Thomas de Moravia, the head of the House of Bothwell, from close ties, evidently was selected to be an hostage for David II, not long before,§ it suited well a Bothwell cadet to be in such honourable and trustworthy situation, as his Armour-bearer. But further still, there is a much more important circumstance seemingly bearing upon, and perhaps

* Printed Chamberlain Rolls, (as before,) Vol. I, pp. 326-8.

† By the Royal Charter in that year, see p. 92.

‡ This will be proved in the sequel.

‖ Regist. Dav. II, p. 45, No. 129.

§ From 1357, see Hailes' Annals before referred to.

illustrative of the Touchadam Bothwell descent, owing to the later Royal grant of Touchadam in 1368, being actually to the said Andrew, as "dilecto *consanguineo* nostro," i. e. of David II.*

Such style of relationship was not *then* given in charters to parties unwarily, or without *due* cause, so that Andrew was assuredly the king's blood kinsman; and if so, as clearly by female descent, owing to the difference of their surnames. Now it is extremely remarkable, that there is one striking way of at once explaining this relationship, and that easy and palpable. Andrew Moray of Bothwell, who succeeded in 1297, father of Thomas de Moravia, the last Baron of Bothwell, who has been mentioned, certainly married Christian Bruce, the sister of King Robert Bruce, and widow of the gallant Sir Christopher Seton—as is proved by the subjoined authorities,†—of whom came his descendants and representatives. Hence, infallibly, Thomas would be *cousin* of David II. the son of King Robert Bruce, and as indubitably Andrew de Moravia, the Touchadam ancestor—*if* a

* See p. 92.

† Mortification by Robert Bruce, in 1324, of a chaplainry, for the soul of the deceased Christopher Seton, with allusion to "Christiana de Bruys, *sponsa sua sororque nostra*," once in the Winton charter-chest.

Dispensation in 1326, "Nobili viro *Andree* de *Moravia*, domino de *Bothevile*," and "nobili mulieri *Cristiane* de Setono *nate* quondam *Roberti* de *Bruys*," allowing them to marry, though in the fourth degree of consanguinity.—Supplement to Andrew's Hist. of the House of Stewart, p. 429.

Charter, without date, by King Robert the Bruce, "*Andree* de Moravia militi *Panetario Scotie*, et *cristiane* sponse sue *sorori nostre* in liberum maritagium," of the lands of Garvianch to them and their heirs.—Lord Haddington's Collections, Advocates' Library.

No other wife has ever been assigned Andrew. The office of "Panetarius" had been in the family in 1293, at least, when Andrew's ancestor, Sir William de Moravia *dominus de Bothevil* Panetarius Scotie," makes certain grants to the See of Glasgow.—See printed Chartulary of Glasgow, Vol. I, ps. 202-234.

Title extant of a missing charter to "*John* Murray, of all his lands, after the decease of *Christian* (*Bruce*), the *King's* sister," *i. e.* of Robert I.—Rob. Ind. p. 37.

Foundation, April 12, 1351, by "Johannes de Moravia *panetarius* Scotie," of a chaplainry out of the lands of Ardtrilly, for the soul "*Domini Andree* de Moravia *patris mei.*"—Chartulary of Moray, printed copy, p. 296. Confirmation May 8, 1353, by "Thomas de Moravia, *panetarius* Scotie," of a previous grant, "*Johannis* de Moravia *fratris* mei senioris."—*Ib.* p. 301. Foundation of a chaplainry, October 1, 1368, by Duncan Walyas, where there is mention, "quondam Thome de Moravia militis domini de Bothvyll."—Printed copy of Chartulary of Glasgow, Vol. I, p. 279.

Of the above John, clearly John Murray of Bothwell, son and heir of the preceding distinguished parties, Thomas de Moravia, the last direct heir-male of the house of Bothwell, (as to the date of whose death hereafter), is besides proved to have been brother and heir, when a hostage for David II in England, by the *Rotuli Scotiæ*.

younger brother of the former, to whom also that *epithet* is *equally* applied in the charter in 1368,—so all that may be material, is to solve this *fraternal* postulate, yea, or nay—it being likewise observable, that Andrew, if a descendant of Christian Bruce, could only be a royal cousin in that express way.—And how else he could have been so, is not easily discoverable. The said Andrew too, presents himself quite in the condition of a younger son, in conformity to the previous hypothesis, inasmuch as, while we cannot trace his family before him as separate, with the exception, probably, of Wicketshaw in the Barony of Bothwell,—he was the acquirer and founder of all their patrimony. Nor, so far as I at present am aware, was it of old the custom of the crown to acknowledge in writs, *distant* relationship in subjects, from whence, I conceive, that that of Andrew to David II. in 1368,—always a strong feature in the Touchadam case,—was *near*, which is of the utmost importance again, as unavoidably rivetting the fraternal connection I have started. Combining this with his christian name of Andrew, being so illustrious in the Bothwell stock, and borne both by the father and grandfather of Thomas his conceived brother,—so that it might so naturally have been thus imparted also to him—the relative induction seems rather likely, nor in any way to be detracted from by the eminent situation of Andrew Moray, first of Touchadam and Manuel, who further appears to have been Sheriff of Perthshire in 1368,*—while the exclusive bearing of the *chief* arms of Moray of Bothwell by his descendant and heir, so far back as 1463,† together with the *Royal tressure*,‡—to *mark* the *Royal descent*—and supporters—independent of the old patrimony, or likely appanage of Wicketschaw, in the Barony of Bothwell,—besides, perhaps, the striking locality of Touchadam as described,—seem to give a kind of rounding to the whole—especially *in re tam antiqua*.

Striking features in the Polmaise descent.

* Under the *Compotum* of Walter Byger, from January 4, 1367, to January 1368, there is a receipt, "per *vicecomitem* de *Strivelyne, viz. Andream* de Moravia."—Printed Chamberlain Rolls, Vol. I, p. 490. While Andrew was then an undoubted Stirlingshire proprietor, I cannot conceive any other there, to whom that description could apply.

† See p. 90.

‡ It is on account of the descent from Christian Bruce that the Bothwell family, like other noted ones in the same predicament, can be held to have been entitled to such honourable and princely accompaniment to their arms. I have not yet found it on their ancienter seals.

Claim of Polmaise to a Bothwell descent as yet as good at least as Abercairneys.

This is all that can be at present safely stated in behalf of the Touchadam or Polmaise descent from Bothwell, which clearly—though not certainly convincing—has yet some apparently strong or plausible points in its behalf,—more so, it may be conceded, than what can properly assist in the claim of the family of Abercairney; who, moreover, if really sprung from Bothwell, must be remoter cadets, previous to the time of Christian Bruce, which may account for their not having *originally* borne (so far as I can yet see) the Royal tressure, like the Touchadam or Polmaise stock, or being designed, so far as I am aware, the king's cousins. At the same time it might follow on my previous hypothesis, that the latter would have the better right to be chiefs of the name, including the noble Moravian branch of Sutherland, who, from what I have shewn—contrary to Mr. Innes—can only be regarded as an ancient younger branch of the main and earliest stem, which Bothwell came to represent.

The family of Moravia anciently, or Murray, as notorious, were numerous, comprising moreover, the old and distinguished branches of Blackbarony and Philiphaugh, with their respective noble and knightly cadets. They ought all regularly—not overlooking the Touchadam or Polmaise stock, in "*re Moraviensi*," to have been noticed and "heard for their interest" by Mr. Innes, who is by far too indulgent to the Sutherland branch, especially after his marked discussion of the Murrays of Tullibardin, and his ruminations upon their descent, to which, though it may be said they have really no connection with the latter, or with the house of Bothwell, he has futilely devoted such a space in his Preface to the Moray Chartulary. Further, still though it be admitted that there is not yet proper or sure proof fully to connect Touchadam with Bothwell, yet what exists in their behalf is *as good*—to say the least of it—as may be urged in that respect in favour of the family of Abercairney,* who therefore

* I need hardly recur to their irrelevant argument formerly (see p. 89) in support of a Bothwell descent, from the "recovery of their inheritance," (quite vaguely) contemplated in an indenture affecting an ancestor in 1375. I observed that might well have referred to some other legal questions that are but seldom wanting in any family, in proof of which directly in the case of the former, I may quote a charter or procedure of Robert Bruce, "super *contradictione Judicii* Air inter *Joannem* de *Moravia* de *Drumsingard* et Dominum Arthurum Campbell, de *terris Glenscanchell superiori.*" Rob. Ind. p. 29. Here, then, was a litigation with a noted Campbell in relation to lands in Argyleshire, affecting an undoubted Drumshergard or Abercairney predecessor, by some *distinct* right, which might equally be that in view in the above indenture.

should never *exclusively* (together with Tullibardin) have been brought by the learned gentleman into the discussion, to the prejudice of all the former,—far less, as if there was no doubt upon the point, made gratuitously to be directly sprung from the Bothwell stem in the person of John Murray, asserted younger son of Andrew Murray of Bothwell, slain in 1297. That being granted *ex facie* of the statement, taken with there being no notice or mention there of any other younger branch, the conclusion in the circumstances must unavoidably follow, of the Abercairneys being now the male chiefs of Bothwell.

On leaving the "Moray" or "Murray" subject, I may add an original entry of the date of the death of Thomas the last "de Moravia" Baron of Bothwell in the direct male line, including a notice of the marriage of his daughter (Johanna) to Archibald Earl of Douglas, who won her in the gallant and chivalrous way peculiar to a Douglas—as well as that of the Earl's death—all from Gray's valuable MS. Obituary and Chronicle, written early in the 16th century.* "Dominus Thomas de Moravia de bothuel dominus obiit anno gratie MCCC sexagesimo sexto,† in assumptione beate marie virginis, et jacet apud Bothuell; decessit apud Newcastell. Obitus Archibaldi comitis de douglas, viz. blak archibald qui fundavit Collegium de bothuel in vigiliis natalis domini anno domini J^{m} iiii^{c}, apud trief; jacet apud bothuell. Iste Archibaldus disponsavit *filiam* et *heredem Thome* de Moravia post mortem patris sui, et duxit eam de Anglia, propter quod prius obtulit se *ad duellum* cum *quinque* Anglicis."

Original obituaries, and notices of the de Moravia and Douglas Families.

Although perhaps withheld by personal considerations, Mr. Innes might yet (preferably certainly to that of Tullibardine,) have dilated a little more in the preface to the Moray Chartulary, upon the subject of the family of Innes—and thereby hangs a tale; but at any rate upon the Dunbars who were hereditary Sheriffs of Moray, and cut a great figure in that district, which comprized both. Neither can he tell us who Columba de Dunbar was—the Bishop of Moray before the middle of the 15th century, a man of note, and who figured abroad. He merely mentions his name in rather a meagre catalogue of the Bishops

Ecclesiastical Moray intimations, supplying deficiencies, or correcting errors in Mr. Innes's Edition of the Moray Chartulary.

* Advocates' Library. Mr. Innes, I see, without referring to any authority, places his death in 1361; (Pref. to Chartulary of Moray, p. xxxviii.) He should have cited Winton in self-defence. He quotes, too, Douglas, the Peerage writer, and *metamorphoser* of the Monk Hamilton, as an authority in the Tullibardine descent; *ibid.* p. xl.

of Moray,* who fell before all others to be minutely sifted and illustrated in an edition of the Chartulary of the *Bishoprick* of Moray, which Mr. Innes devotes in part to rather more irrelevant topics. Upon this account I may give the following original authority fixing the Bishop's family. Charter dated at Dunbar, October 10, 1423, by " Georgius de Dunbar, Comes Marchie, consanguineo nostro Georgio de Kyrkepatrik filio Thome de Kyrkepatrik militis domini de Kylosbern,†" of the lands of Dalgernock in the Barony of Tibbers, upon the resignation of Edward Crawford, which is witnessed by " Patricio de dunbar filio nostro et herede, *Columba* de *Dunbar* FRATRE *nostro Episcopo Moraviensi*, Patricio de Dunbar militi domino de bele, patricio de dunbar filio suo, Gilberto Grem ballivo nostro de tyberis, et hugone de Spens scutifero nostro.‡" The Bishop then was a younger brother of the formerly great and illustrious family of the Dunbars, Earls of March, and not as Keith erroneously represents of the *(Dunbars)* " Earls of Moray,"‖ who were but cadets of the latter. By a curious original notarial proceeding regarding the right of patronage of the church of " Lunderthtin," in the gift of Alexander Earl of Crawford, dated March 23, 1426, it is proved that " *Columba*, Bishop of Moray," would not then admit the presentee of the Earl to the charge, " sine consensu capituli sui."§ He hence was there at least Bishop in 1426, which directly exposes another error of Mr. Innes, who, as usual, without appealing to any authority, cruelly stints his enjoyment of the Bishoprick, by stating that he only " succeeded" to the same " in 1429,"¶ whereas it is clear he held it several years before. This is rather unfortunate, because he announces that his list, evidently intended to be especially accurate, is to correct the mistakes of Bishop Keith and Shaw, (to the former of whom I suspect he is *somewhat* indebted for his information,) and to " be of use to the student of the history and antiquities of the Province" of Moray.** In the above matter, however, such student would be misled by Mr. Innes.

* See Pref. *ut sup.* p. xiv.

† *Closeburn*, the heir-male and representative of the ancient and distinguished family of Kirkpatrick of Closeburn in Dumfriesshire, of whom descends that well-known, accomplished and edifying antiquary, Charles Kirkpatrick Sharpe, Esq.

‡ Original Drumlanrig Charter-Chest.

‖ See his Bishop's first edit. p. 84.

§ Original Balcarras Charter-Chest.

¶ Pref. p. xiv.

** *Ibid.* p. xii.

He is so much engrossed and seduced by his captivating pursuit of Genealogy—not however with the greatest success as may have been evident—that he would appear to have been obliged to allot less space than was fitting in an Edition of the Chartulary of the Bishoprick of Moray to the religious notices and institutions of that See. However interesting the study of Genealogy may be, yet even it should be kept within certain bounds, especially in such a work, where undoubtedly the preference ought to have been given to the former, even before the origin of the Murrays of Tullibardin, that barren and unproductive topic by his own shewing, and that might have been well discussed in half a page instead of expending four. Not recurring to his inadvertence regarding Bishop Columba, he might have been arrested in the Preface by the interesting grant of Alexander II, in the Chartulary whereby he founds a Chaplainry, in the Cathedral of Moray, " pro *anima* Regis *Duncani*" allotting an annualrent of three marks yearly, for the purpose out of " firma burgi de Elgin."* The notice is especially deserving attention when this is the very Duncan with whom our impressions are so much chained and associated in Macbeth, nearly the earliest Monarch with whom Lord Hailes can safely commence his Scottish Annals;† nay in regard to whom, and even our latter Scotch Kings, so little is to be gleaned and recovered in an authentic shape. And with it, too, he might have further combined this charge or payment in an original Exchequer Roll, from February 10th 1455, to September 22d 1456. " Et capellano domini nostri Regis celebranti in ecclesia Cathedrali Moraviensi pro anima quondam Regis *Duncani*, et omnium defunctorum, percipienti annuatim de firma burgi de Elgin quadraginta solidos, ex infeodatione quondam domini Alexandri Regis de termino hujus compoti xx^{li}." The year then began on the 25th of March. The old foundation was thus piously kept up, and the difference in the amount of the revenue or payments for the purpose may be curious, and elicit remark. The roll in question may be a useful aid, too, in other such respects to the Chartulary of the See of Moray, as is obvious from these further entries. Of " viii^{li}, &c." domino Ade fores capellano celebranti pro anima Johannis quondam liddale in Ecclesia Cathedrali de Elgyn." I

* Printed Chartulary of Moray, p. 30.

† " Malcom II, King of Scotland, had a daughter Beatrice, the mother of *Duncan*. In 1034, he was assassinated by Macbeth;" this is the way his Lordship begins his Annals, and all he says about him. See Ann. Edit. 1797, Vol. I, p. 1.

have not found a notice of this in the above Chartulary. Also from this, "cuidem capellano celebranti in dicta ecclesia cathedrali et fundato in eadem super dominio de Lambride percipienti annuatim de dicto dominio octo marcas. Et capellano sancte crucis in dicta ecclesia celebranti annuatim, percipienti de terris infra dominium de Pety de glebis terrarum ecclesiaticarum fundato per quondam *dominum* de Moravia, octo marcas,"—the latter, as formerly observed, was head of the house of Bothwell. By a solemn agreement upon record before the middle of the 16th century, William Sutherland of Duffus, is bound to infeft Donald M'Ky, of Far, in lands in Strathnaver, to be "haldin be him of ye Kirk of Murray," in feuferm, "for ye yerelie payment to twa chaplenis foundit at Sanct Michaelis altare, wytin ye cathedrale Kirk of Murray, be umquhile Dame Janet, ye spous of umquhile friskin of Murray, of ye soume of xii merks—at twa termes in ye zere, &c. and geving iii suitis at thrie heid courtis of ye bischop of Murray, and makin yer aith of *infidelitie** to ye bischope forsade his cheptour and successoures &c. after ye forme of ye saide Williams infeftment." This mortification is not given *ad longum* in the Chartulary of Moray, it is only generally referred to in a grant in 1260,† nor so fully as in the above authority, which communicates the additional fact of the chaplainries being founded at Saint Michael's Altar in the church, besides the explicit *reddendo*. Friskin, who figured before and after the 13th century, was of the same stock with the house of Bothwell, but he left no male issue by the above Janet, the heiress of the lands of Strathnaver alluded to. In the previous roll there is also mention of payment to a chaplain for saying mass in the chapel of the Castle of Elgin, "pro anima quondam Jacobi dunbar Comitis Moravie" who was to be sustained by an yearly payment out of the lands of Petyndreich. This Earl, who figured in the reign of James I, had been previously James Dunbar of Frendraught, and succeeded as collateral heir male of Earl Thomas his predecessor. The above religious Moray notices may be therefore serviceable, and perhaps added to the second edition of the Chartulary of Moray. The number of religious institutions, especially chapels (often kind of relief churches) in that age, must arrest the attention of every antiquary, and certainly warrant the increase of such edi-

* This is a *curious* use of the term. † See printed copy, p. 139.

fices at present, as has been piously in part effected, during a denser and far more crowded state of the population.

Why, too, has Mr. Innes no notice in his Preface to the Chartulary of Moray of the famous old Castle of Darnaway, so fraught with ancient historical associations, and besides the principal castle and messuage of the Province of Moray? His utter silence here is not in the best keeping with the large and unconscionable space he has assigned, in exclusion of other religious matters, in his Preface of the Holyroodhouse Chartulary, to the history and memorials of the later structure of the Palace of Holyroodhouse, involving details that rather exceed the limits within which such should be restricted on an occasion of the kind. No doubt there was inducement to this from recent processes and litigations regarding the Palace, Sanctuary, and Park, that have in part elicited relative materials and information convenient for the purpose, and supplying the wants of the Preface, too tempting perhaps, in this view to be overlooked. But if he had been in a like temper when compiling the Moray Preface, not so much estranged by the Sutherlands and Tullibardins, the same accidental Exchequer Roll that has been alluded to* would have also, after a similar fashion, assisted him a little, in respect to Darnaway or Tarnaway Castle, as imposing and venerated in its own quarter as Holyroodhouse in the other. The Roll comprising, as has been shewn, the period between February 10, 1455, and the 22d of September 1456, has these curious charges among the expensæ "pro tegulis et textura *aule* de *Tarnaway* ultra viginti libras datas tectori per *quondam* Comitem Moravie *ultimo defunctum*, in plenam solutionem centum marcarum per eundem quondam Comitem sibi pro eadem tectura promissarum; ipso tectori videlicet Johanne Sklater fatente per literas receptionem super compotum xlvi^{li} xiii^{s} iiii^{d}. Et eidem tectori pro calce, clavis ferreis, et expensis suis tempore tecture supradicte et expensis servientium eidem, et expensis eorum et feodis suis xx^{li}. . . . .—Et per solutionem factam Thome Ogilvy vicecomiti de Elgyn et Fores ac custodi castri de Tarnaway pro feodo suo xxvi^{li} xii^{s} iiii^{d}. Et allocantur *eidem* (*compotanti*) pro appositione magnorum lignorum et firmatione eorundem cum magnis clavis ferreis ad *coplas dicte aule* pro conservatione tegularum ad utrumque gabulum eiusdem xl^{s}."

Original notices regarding the old hall in Darnaway Castle.

* It is among the public records in her Majesty's General Register-House, Edinburgh.

In this way the celebrated hall of the castle, the only ancient part of the fabric now standing, even by the *forbearance* of architects, was re-edified, if not first properly constructed, in its present fashion, shortly after the middle of the 15th century, the operations having obviously been commenced by Archibald Douglas, the last Earl of Moray, who had just fallen in rebellion against the King at the battle of Arkinholm in 1455; owing to which the Earldom had escheated to the crown. Like nearly all of the remarkable family of Douglas, he was chivalrous and warlike, and acquired the Earldom of Moray, in the first instance at least, by marriage with Elizabeth Dunbar, whom I hold to be the heir of line of the Dunbars, Earls of Moray, instead of heir only of a *junior* branch, as I have endeavoured to shew by evidence—contrary to the usual opinion—in a recent performance.*

Antiquarian wonders of Mr. Innes,—if so?

Mr. Innes is certainly thankful for small mercies, abstaining from the trite imputation of his turkies proving geese. He again in part, as in the instance of that of Paisley, discovers unknown treasures in the Chartulary of Melrose, by a kind of second sight denied to others. In his Preface to the latter, he exultingly proclaims, that "the following instances, taken almost at *random (I fear they are,)* may serve to *show the information* to be derived by the genealogist from *these stores*, (*treasures* of *Melrose* again,)—"No. 48,"† he says, actually "gives a second marriage of Patrick, called the 5th Earl of Dunbar;"—next, "No. 109," remarkably "records Christiana, the wife of the Constable William de Morevil,"—and "in No. 233, are some conditions that *throw light* on the interesting *pedigree* of the Earls *palatine of Stratherne.*"‡ In this manner, he points out, with his wand or finger, as it were, after the manner of a showman in a menagerie, his *speciosa miracula*,—his genealogical wonders to his astonished auditors, (villagers they should be,) all doubtless struck dumb with admiration and surprize: but alas! at the first survey, we townspeople on the other hand, are fated to experience but deep disappointment. "No. 48," when we examine closely that antiquarian repository or cell, only imperfectly unfolds a female, of whom

* Peerage and Consistorial Law, v. ii, p. 866. Although the fact is not known to our Peerage writers, yet it is proved by a charter in 1455, and other evidence, that the Earldom of Moray was then granted to David Stewart, third son of James II, who died young.

† He refers here to individual Charters, they being singly numerically marked.

‡ Pref. to Chartulary of Melrose, Vol. I, p. xxiii.

there are elsewhere far better specimens. To drop the metaphor, the charter here referred to proves the mere barren fact of the Earl Patrick of Dunbar in question, having had a wife of the name of " Christian,"—no more. This is indeed a *great* accession to the stores and *treasures* of antiquarian knowledge; but not only is her surname here withheld; but her distinctive character, and excellent dispositions, can be further elsewhere established by a legal authority I formerly published, whereby we learn that the said " christiane *bruce*, Countess of Dunbar," for such was her surname, " for yat tyme,—mouit of devotione, biggit and foundit ane house of religione in ye toune of dunbar, and gaif ye samyn, wyt all ye rentis and proffitis yerof to god, and to ye breyer of ye ordoure, and religioune of ye Trinite, submittand ye samyne religious house to ye caire and zaill of ye minister of ye place,"* It is truly pleasing to be thus enabled to commemorate so pious and liberal a lady.—We next come to the novel and transcendant No. 109, pointed out by the learned gentleman, which introduces and represents to us Christiana, the wife of the Constable William de Moreuil, in the 12th century. But Mr. Innes, I can assure you she is no new star, you have been here sadly forestalled, she has been shewn off, and made her *debut aliundè*, nay in a common printed performance, as far back as 1807, by one George Chalmers, which unfolds his prior acquaintance and familiarity with the *faithless* lady; for he there, after identically exhibiting the said William de Moreuil her husband, not only specifies this Christiana as his help-mate, but alas! to the ruin and demolition of all novelty, adds, that " Christian is *frequently* mentioned as his wife," for which he refers to " Chart. in *Bib. Harl.*" and " *Chart. Glasgow*, p. 165."† And sorry am I to add, upon inspection of the latter Chartulary,—in full depreciation of that of Melrose,—or Mr. Innes,—as unique in the Christinian information,—that Chalmers is justified in his assertion.‡ But my interest and attention were, at the first glance, more especially

* See Peerage and Consistorial Law, p. 1038, Note.

† Caledonia, Vol. I, p. 504, Note. He says, (alluding to the text,) that this William Morville " married *Christian*, though of what Family does not appear, but she brought him no issue, and he died in 1196."

‡ The Register in question contains a grant by the said " Willielmus do Morevil Constabularius Regis Scotiæ," of the lands of Gilmureston, " edulfo filio Uctredi;" that is witnessed " *Christiana uxore mea*," Christina coming thus pointly forward as a witness in a masculine grant, contrary to the later Scotch Law, which rejected female testimony, to vindicate her own celebrity and notoriety against Mr. Innes.

awakened by No. 233, the remaining wonder predicated by Mr. Innes, in respect to the Earldom of Strathern,—of which however, rather adversely, in *limine* to his statement, there is no proper proof of its being a Palatinate till about the middle of the 14th century. That honour, like all our ancient noble fiefs, had directly attracted my attention, as is partly evinced by my deduction and account of the older Earls of Strathern and Caithness, in a recent performance,* though I could no more figure or conceive how the Chartulary of Melrose was here to assist or enlighten, than that of Paisley before, in the provoking and disappointing instance of Hamilton. And on examining the new Stratherne evidence, I found alas! I was only to be doomed to meet a like result, and to experience thereby, a second grievous disappointment. The authority No. 233, proves no more than the known and trite fact, that Malise, Earl of Strathern, in the 13th century, (previous to any attaching Palatinate honours,) had married Marjory, daughter and co-parcener of Robert de Muscamp, or de Musco-campo, a noted Northumbrian Baron. Why, that again had been long ago set forth in a common printed book familiar to all,—which happened to be close beside me at the time;—"Collins on Baronies," published in 1734, where it is expressly stated,† that "Sir Robert of Muschamp, Lord and Baron of Wallovere, in Northumberland," had "Mary," a "second daughter" and co-parcener, "married to the Earl of Stratherne, in Scotland," *with* the *further* intimation still, *not* in the Chartulary, of the names of other daughters and co-parceners, with their marriages, namely, of Cicely, the eldest, stated to be married to Odonel of Ford, and of Isabel the youngest, as the wife of William of Huntercombe—while the issue of the Countess are even given, as *Muriel* and *Mary*.‡ What an accession had this been to Mr. Innes's stores of genealogical information, and how valuable for his Chartularian Prefaces! Besides, even Wood—to shew how little novelty there is in the thing—makes explicit mention in his edition of Douglas's Peerage, under the article of Strathern, of this very "Marjorie de

* Peerage and Consistorial Law, p. 561, *et seq.* † At p. 388.

‡ At that period there was some confusion in female christian names, especially between Mary, Mariot, and Marjory, that were occasionally identified with each other. I add this in reference to the Countess,—see afterwards as to Mariot.

Musco campo Comitissæ de Strathern,"—nay, even a greater accession still to the Melrose Chartulary, extends the descent to Mary, one of her co-heiresses, as the wife of Sir Nicolas Graham, and that upon the more respectable authority of Robertson's Index.* Independently, too, there are in the very public printed Records at every one's inspection, other original legal proof of this *wonderful* and before *unheard of de* Musco campo Strathern connexion, with even *new* results, as by the authorities subjoined.† One question I may ask here in passing ;—laying then

* See Wood's Douglas's Peerage, Vol. II, p. 558. Mr. Innes, I might complain, here reduces me to the sad dilemma of referring for a fact to a *Scotch* Peerage book—and that partly *Douglas's*.

† " Comes de Straern (then fully fixed to be Malisius) finem fecit cum Rege per centum libras, vel per quindecim marcas auri pro habenda custodia cum maritagio *Murielle* et *Marie* filiarum suarum *(by the Muschamp coheiress clearly)*, et similiter pro habenda custodia mediatis terrarum que fuerunt *Isabelle* de Ford que predictis Murielle et Marie hereditarie contingunt." Abbreviat. Exchequer Rolls, p. 15. 40th of Henry III, *i. e.* 1256. Isabel de Forde, a Muschamp coparcener, daughter and heiress of Cecilia de Forde before mentioned, had predeceased without issue, (see p. 104, and hereafter.) " Rex cepit homagium *Nicholai de Graham* qui *Mariam sororem* et *heredem* Murielle quondam Comitisse de Mar *defuncte* duxit in *uxorem* de omnibus terris &c. que eadem Muriella soror ipsius Marie tenuit de Rege in capite," (in the County of Northumberland, " 20th of Ed. I, *i. e.* 1292," *ib.* p. 70.) Tbis last notice *has* a valuable intimation expiscating the name and parentage of a *new* Countess of Mar. We thus find that the cotemporary Earl of Mar married Muriel, daughter of Malisius, Earl of Strathern, by the Muschamp co-heiress.

" Per breve de quare impedit dominus Rex implacitat abbatem de Alnewyck pro presentatione sua ad ecclesiam de Wollore, abbas dicere quod dominus Rex nunc per cartam suam quam hic recitat licentiam dedit *Marie* que *fecit uxor Nicolai de Graham* quod ipsa advocationem ecclesie predicte dare posset et assignare dicto Abbati et conventui et illam appropriare, &c. Ideo habeat dictus Abbas breve episcopo Dunelmensi quod ipse episcopus idoneam personam admittat (under the head of Northumberland,) 6th of Edward II, *i. e.* 1313. (Abbreviatio Placitorum in curia Regis, &c. p. 315.) Mary had thus survived her spouse Sir Nicolas, and the case regards the Muschamp inheritance.

Confirmation by Robert I. (once in the Winton charter-chest) dated at Colbrandspeth, die Lunæ post festum Barnabæ Apostoli, in 1320, of a grant by Patrick Earl of March, " Domino Alexandro Settone militi," of the tenement of Halsington, Berwickshire, " quod quidem tenementum *Mariota sponsa Nicolai de Grahame* militis filia et *una heredum Mariotæ* de *Musco campo Comitissæ de Stratherne* in sua viduitate dicto Patricio Comiti Marchiarum prestitit." The two last authorities prove Mary and Mariot the same. The Chartulary of Melrose so much extolled here by Mr. Innes, gives the narrowest and most insignificant information upon the point imaginable. Every other is more full and abundant. To end with Dugdale's English Baronage, besides the alliances of the Muschamp co-heiresses with Malisius Earl of Stratherne, Odonell de Forde, and Huntercomb, it is added (under the head of the Barons of Muscamp), that Isabel Forde, formerly mentioned, daughter and eventui heiress of Cecilia, Forde's wife, married Adam de Wiggeton, but, as premised, evidently without issue, Bar. Vol. I, p. 557.

Remarks as to Mr. Innes's critical relevancy.

such stress and importance upon such very nonentities, *qua* attractive and novel, like the preceding, in the path of antiquarian pursuit, with what relevancy and good keeping can Mr. Innes, as he does, affect to despise the *really* interesting and partly novel details, too, in the far weightier and legal matter of Robert II and Elizabeth Mure, which he acutely and oracularly puts upon the shelf, gravely predicating that they "have fortunately taken their proper rank as mere subjects of antiquarian curiosity,"*—as to which *he must* be the *best* judge. There would really, in his criticism and discussions, *Leonine*-like, appear to be one law and rule for himself—large and favourable enough—but a different and very stinted for others.

Mr. Innes, rather amusingly too, often talks of "*treasures*," which seems a favourite term with him. Thus we have the stored treasures of the chartulary of Paisley,*—"the treasures of the Scots College" at Paris,†—its "treasury," its "historical treasure,"‡ (*how* attempted in 1771, has been seen,‖) the stores—or treasures—of Melrose, &c. of which we have just had a glance. But however, he may press his hand upon his forehead, and whatever grievous exertions he may make to arrest or realize this bright vision, they, in part at least, as we have experienced are unavailing. Such constant contemplation of, and aspirations after treasures, in what must still be confessed rather a barren department, somewhat like his own country, has too much of a Scotch semblance and characteristic, and may commove our neighbours, owing to the *auri sacra fames*—the satirized Scotch propensity for the valuable commodity in England,—while Mr. Innes irresistibly reminds us in his distressing and baffled attempts as shewn, of Hogarth's distressed poet cudgelling his brains with his hands to bring out corresponding golden results, —though in vain in a pursuit rendered equally barren,—to him by *his* intellect—his mind at the sametime, in the course of his poem actually upon riches, constantly rivetted in despair upon the flattering ideas of treasures and golden mines, that are even depicted upon his garret.

* Or "the genealogical *stores treasured*" there, including the new Hamilton evidence. See p. 73.

† See p. 42.

‡ See Pref. to Chartulary of Glasgow, Vol. I. pp. 1–11.

‖ See p. 42.

Mr. Innes, notwithstanding, does start something original in the genealogical study or pursuit; from his late edition of the Chartulary of Glasgow, according to his own showing, we must conclude what no genealogist has even figured, or imagined, that the great families of de Morvill and Moravia were one and the same, and that the direct line of the Morvills were withal Lords of Bothwell,—and hence, also, for what we can see *Panetarii* Scotiæ. In this way they must have conjoined their undoubted high hereditary office of Constable of Scotland with the inferior one of *Panetarius*, or "*Pantrieman*" of Scotland, as it is amusingly translated in the old title of a missing charter in the reign of David II. in Robertson's Index.*

Remarkable originality or inadvertence of Mr. Innes.

Upon turning up the learned gentleman's Index to the above Chartulary, we find under the head of "*Morvilla*," the express entry of "Thomas de *Moruilla*, Dominus de *Bothuylle*," with reference to page 279 of the text, which, upon examination, contains mention alone, "quondam thome *de Moravia*, militis domini de *Bothuylle*,"—who must therefore be identical with the former. Again, under "Willielmus de *Moruilla*," in the Index, there is reference to p. 217, and upon sifting the latter, up *alone* starts—nearly as *before*—his conceived self and counterpart, "Dominus Willielmus de *Moravia*, *dominus* quondam de *Botheville*;" while elsewhere, in like manner in the text, "Willielmus de *Moravia* do minus de *Bothvil panetarius* Scotie" answers to the mere "Willielmus de *Morvilla*" in the index.† How otherwise are we to account for this? I fear gravely, however, we must after all place Mr. Innes again in a dilemma; we must conclude either that his genealogical knowledge is but imperfect, to permit him to entertain such an erroneous case of identity as that in question truly is,—as must be obvious to *most* Antiquaries,—or that the said error has originated in inadvertence. In the one alternative there would be an imputation against his proficiency in his "captivating" pursuit; in the other against his care and accuracy as an editor. *Utrum* horum mavis *accipere*?—while it must be confessed, a very scrupulous editor, even if the two surnames of De Moravia and de Morvil were really the same, would still have preserved the strict orthography of both, and still entered them *separately*, *ex terminis*, in the index, though with a mutual reference to each other.

* P. 54 *ibid.* † See index of the Chartulary, &c.

But elsewhere in the Moray Index, Mr. Innes follows a more simple and easy method, not troubling himself with any reference at all. Thus we have under "De Moravia,"—the nondescript "Thomas panetarius Scotie," quite isolatedly rejoicing in his free independence in this respect, without observing the formality of his paginal address, and wholly oblivious of aught but himself. The preceding are only casual and accidental detections without anything like a close examination, which I have not made, being unwilling to press the learned gentleman too hard, or too rigorously to scan or expose his errors.

Gross error of Mr. Innes in regard to the Riddell family, and hence compulsion upon the author to notice and correct the same.

I did not expect the honour of being in a *quasi*-private capacity —if I may use the expression—evoked into a controversy with Mr. Innes, but so it is. I have, of course, always avoided any notice or introduction of the family to which I belong, in discussions; because, however interesting such domestic details may be to the parties concerned, they are but seldom to the public. They should only be broached when expiscating some new material fact in law, history, or otherwise—of course when illustrating and fixing other descents; and I confess I am rather of the opinion of Marmontel's nobleman, that however it behoves all persons not to be ignorant in such subjects, it is best to keep them in *retentis*. But the learned gentleman has perpetrated so gross an error and misrepresentation, in regard to the Riddells of Roxburghshire—of whom I happen to be no very distant cadet —that for the mere sake of truth and accuracy—so indispensable in the Editor of a Chartulary—while, if I were silent, I might appear to homologate and confirm flagrant error,—the correction of which, Lord Hailes says, is always right and profitable—that I have been induced, however unwillingly, to go into the matter. Free discussion, likewise, I have always advocated—as I shall ever do—in the case of other families, and hence may be the better allowed to discuss my own when assailed,—at the sametime expressing my deep obligations to any one who would be so kind and condescending as truly to enlighten and instruct me so far, however it might bear.

In his Preface to the Chartulary of Melrose, which contains various notices of the Riddells, (or Ridale, as the surname has been spelt), at the remote periods of the 12th and 13th* centuries, Mr. Innes has this passage latterly in reference to them,

* Including the reign of David I. from 1124 to 1153, and downwards.

" Most of the *Norman* settlers—(he is here talking of the south as connected with Melrose, which is in Roxburghshire)—had either previously fixed seignorial surnames, *as de Vesci, de Morevil, de Valoniis, de Brus,* OR soon assumed local designations from the territories acquired by them in Scotland, *as de Wittune, de Ridale de Molle.*"* The last are thus thrown into a subaltern class, Ridale with de Molle, being postponed to the comparatively obscure de Wittunes. From the above disclosure, therefore, certainly if we are to believe the learned gentleman, the family of Riddell of Roxburghshire only derived their surname from *lands* granted to them in that county,† and posterior to those of the higher and first mentioned class, who had their's, per *excellentiam*, in a personal capacity long before. How this may be reconciled with Chalmers's statement, (a neutral person), who, in support of the earliest use and introduction of surnames in Scotland at the beginning of the 12th century, exclusively cites the instances of " Gervase *Riddel (of Roxburghshire)*, and Robert *Corbet*," who *thus* witness the *Inquisitio Principis Davidis*, in 1116, the *oldest* authentic Scotch document extant; and next adds, that " Riddel and Corbet are the two *oldest surnames* which can be traced in the Chartularies of Scotland,"‡ I will not stop to answer:—but with respect to the *assigned territorial* assumption of theirs according to Mr. Innes,—and, of course, subsequently, on the part of the Riddells,—I may maintain, that nothing is so futile and visionary, or can be so easily refuted.

Original Riddell Charter by David I.

The *original* Riddell charter or title to their lands in Roxburghshire—I mean of the knightly family of the name recently there—by David I—although without date, yet sometime between 1124 and 1153—the duration of his reign—first conveys the lands of *Whitunes*, et dimidium Escheto et *Lilislive*, &c. (what afterwards solely constituted the Riddell estate in that county), " Waltero *de* RIDDALE,"—sibi et heredibus suis—tenendas, &c. in feodo et hereditate libere, per servitium unius militis, *(the exclusive tenure,)* sicut unus Baronum meorum vicinorum, &c.‖

* Pref. to Chartulary noticed, Vol. I, p. xiv. I have given the passage quite literally; only what is in Italics is, by direct connection and reference, inserted in the notes rather clumsily, instead of the text, where it should have been.

† This necessarily follows, there having been no other Riddell or Ridale in Scotland, how named will afterwards appear. Walter Fitzalan, the Stewart, married Eschena *de Molle*. Molle of Mains is an old race. ‡ Caledonia, Vol. I, p. 771.

‖ Riddell Charter-Chest. The grant is dated at Scone, and witnessed by Walter.

Walter de Riddale, the grantee, was succeeded by his brother, Sir Ansketin de Ridale, (whose christian name is quite Norman) in the lands, which descended from him through suc-

Fitzalan, the High Stewart, Walter de Lindsay, Richardo de Moreuil 'the Constable, and Alexander Seton, the ancestor of the Winton family, &c.; but however eminent these parties are, it is not easy to fix the precise date. The grant in question has been said to be the oldest in Scotland extant to a Laic. There is in the modern transcript of the Chartulary of Coldingham, in the Advocates' Library, a charter also by David I, without date, (which, owing to the above remark, I must of course in justice notice,) of the lands of Swintun, in feodo "meo militi Hernulfo. It has been held the constituting charter of the lands of Swintun, in favour of the subsequent and still existing respectable family of that name. The first figuring with the surname of Swinton, (for Hernulf evidently had none,) is "Sir Alan de Swinton," at the close of the 12th century, there being a complete blank in the interval, after the naked mention of Hernulf—and the material question here is, was he the heir-male of Hernulf? It must be admitted that there is considerable likelihood and presumption in favour of the inference, though we must take rather a leap to come to the conclusion. The difficulty arises from the want of a *surname* in the original grantee distinct from the lands, that *semel et simul* might have proved an important chain of connection—and whose advantage we thus find—as also absence of any proof of his *immediate* issue and descendants, which holds conversely, *vice versa*, so beneficially in the cases of the families of Innes and Riddell, as will be seen. It is hence always possible to conceive that some new acquirer might have stept in, in the Swinton instance, between Hernulf and Sir Alan, from whom he might have sprung, at such an unsettled and turbulent period. Our genealogists, however, as usual, take a still more surprising leap than the above, in the case of the family of Swinton. It transpires from the transcript of the original grant to Hernulf, in *quequidem* fashion, that the lands of Swinton, previous to this new title, *had* belonged to a certain Liulf, the son of Edulf, and to Udard his son. Here were no less than three generations made out at a very remote period, a thing too good to lose and not turn to account; and therefore, though there is every presumption in the circumstances to the contrary, and although there be not a vestige of such relationship in the grant, these are all by Douglas, the metamorphoser of the Monk, Hamilton, (see p. 76.) kindly ancestered upon Hernulf, and made seriatim to be his father, grandfather, and great-grandfather, (see his Baronage, p. 127), from whence it results, that Swinton stalks forth by far the oldest Saxon race in Scotland. Nisbet was more modest, and only begins the Swinton pedigree with Ernulf as their "predecessor." (See Heraldry, original edition, vol. i, p. 322.) I need hardly observe how common it is in grants to a singular successor, in the above way to recite the previous possessors, though quite distinct from the new. Thus out of innumerable instances, there are charters by Robert Bruce to James Douglas, and *Walter* fitz gilbert (the *Hamilton ancestor*) respectively, of the lands of Bethocrule and Machan, "*quilk was* John Cumings," and "whilk belonged to John Comyn, Knight," (Rob. Ind. ps. 5 and 7. This Comyn, it is notorious, had been forfeited, and was of a perfectly distinct family from the former; yet he might equally by Douglas, as in the Swinton instance, have been made their ancestor, with what truth and justice it would be superfluous to add. I, however, may truly add, that the existing Swintons are an old family, and especially chivalrous and distinguished towards the end of the 14th century, when their predecessor, Sir John Swinton, moreover, married Margaret Countess of Douglas and of Mar, in her own right, the mother of the hero of Otterburn. I have seen an original charter, yet extant, December 5, 1389, by

Old family of Swinton and their original charter.

cessive heirs, to the late Sir John Riddell of Riddell, Baronet,* the male representative, after whose death in 1819, they were only first alienated, and left the family. Respecting the original ancestry by the way,—independent of the authenticated chain from Walter to Sir Ansketin, his brother, and from him again, to his son, Walter de Ridale,†—it has attracted the attention of antiquaries, that no less than four generations subsequently from the time of King William the Lyon, are articulately proved by the Chartulary of Melrose alone,—nay even by one small deed there.‡ The cardinal charter referred to, however, by David I. at once solves the point at issue.—Walter Riddell, the first taker thereby, had thus indubitably a *surname* of his *own*,—namely *Ridale*,—*before* he acquired any lands in Roxburghshire, or probably in Scotland, which besides, being quite *different*, and *discrepant* in their *denominations*, as evinced, could *never*, as Mr. Innes yet predicates, have initiated a surname in the instance of the Riddells,—seeing what is notorious, they constantly thereafter (as *well* as *before)* down even to this day, adhered to, and retained the former. Hence, his confident assertion,—made with his usual acuteness and research,—as I premised, that the family in question merely obtained a local designation or surname from

Remarkable ancient evidence in the Riddell instance.

Johannes de Swyntoun *dominus* de *Mar*, et Margareta de Douglas Comitissa de Douglas et de Mar, whereby they guarantee " Willielmo de Douglas filio quondam domini *Jacobi Comitis* de *Douglas*, &c." (the *above hero*,) the Barony of Drumlanrig, in terms of the condition " in carta prædicti Jacobis Comitis de douglas *filii nostri* (*in law*, in reference to *Swinton*,) dicto Willielmo filio suo," &c. This William was the founder of the noble family of Queensberry. The male confirmer, a worthy father-in-law to the Earl, is " dominus de Mar," in right of his wife, while the deed has also his seal of arms, exhibiting a chevron between three boars' heads; another boar's head as his crest, with two *lions* for *supporters*, thus different from *those* that the family have latterly carried. See Nisbet, *ut sup.* vol. i, p. 322.

* Of whom there are notices in Mr. Lockhart's Life of Sir Walter Scott.

† The links being unprecedentedly established *seriatim* by two Papal Bulls in reference to the estate, in the Riddell charter-chest, shortly after the middle of the 12th century.

‡ A confirmation in the time of William the Lyon, (who required from 1165 to 1214) by " Walterus de Ridale, *filius et hæres* Patricii de Ridale," of a grant of lands in the original patrimony of Whittun, which " *William*, Walter's *son and heir*," and Isabella, his wife, had made to Melrose, and which is witnessed moreover by *William* the " *son* of the *said William*," and " *grandson*" of Walter. It fills less than a page. Printed Chartulary of Melrose, p. 152. There are there besides, other deeds fully authenticating these generations, with royal grants, containing notices of Gervasius de Ridel in the reign of David I.

the territories they acquired in Scotland, is at once utterly shattered and nullified.

The exclusively *personal* surname of Riddell attaching as maintained, is evinced not only by David the First's charter, noticed, but from Walter's the grantee's unvaried subscription *accordingly*, to other, and as may be presumed, earlier grants of the monarch; he being, as Sir James Dalrymple justly remarks, "an *ordinar* witness to his charters."* And independently still, as may be already obvious, there is the subscription of "Gervasius de Ridel," (the first "Vice comes de *Rokesburch*,"†) even anteriorly to the "Inquisitio" of David, before his accession, when only Prince of Cumberland, in 1116—the oldest authentic Scotch instrument—where, by the way too, there is no trace of Mr. Innes's favourite de Vescis, or de Valoniis, to whom he gives here so exclusive a preference;—which all,—including "Gervasius *de Ridel*," or "Ridale," *qua such*, being moreover a frequent witness to David's charters,"‡ establishes the still remoter use and antiquity of that surname, which was thus not local, but wholly personal as to Scotland. I might further instance to the same effect, its use and prevalence elsewhere, in the stock, that century. Chalmers states that "the Ridels also spread into Midlothian," and that "Hugh de Ridel, who was probably the son of Gervasius, settled at Cranstown, which was *called* from *him* Cranston-*Ridel*."‖ Here again, in refutation of Mr. Innes, the family, instead of taking their surname from lands, *gave it vice versa* to them; while the above author adds, that Hugh "had a brother Jordan, who appears in the chartularies under Malcom IV," and that "from this double stock of the Ridels, (always retaining their *original* surname,) branched out several families in different districts of Scotland,"—most however,—if not all of whom, (except the knightly stem,) have now failed.

* See Collections concerning the Scottish History, p. 348.

† *Roxburgh*, see afterwards.

‡ This is quite evident after looking at the Royal Charters for the time; and again, Sir James Dalrymple says, that "Gervasius Ridel (besides testing the *Inquisitio)* is an ordinary witness in the charters of *this Prince (David I,)* after he was King; and in one to the Priory of Coldingham, he is designed Gervasius Vicecomes de Rokesburch." Collections, *ut sup.* p. 348.

‖ Caledonia, vol. I. p. 506, and see also Sir James Dalrymple, *ut sup.* p. 349. It is remarkable too, that the lands of Cranston *Riddell* still kept that name when they passed to other families;—Chalmers at the sametime intimates, that "the Ridels of Rox-

Such, and no other practice, still more in refutation of the learned gentleman, obtained in like manner, most especially in reference to the lands the Riddells acquired in Roxburghshire, namely Lillislie, Lilisliue or *Lilisclive*, and Whittune, &c. constituting exclusively the family estate in that quarter. Chalmers further says in corroboration, in his account of that county, that "the Riddels long flourished *here*, (at *Lilliesclif*,) and *gave* their own *name* to the village of *Riddel*, and to the *hamlet* of Riddel-shiel on the Ale water, within the parish of Lilliesclif;"* and the fact essentially is legally proved by the subjoined authorities.†—If we

burgh shire, settled various vassals under them, who also contributed to swell the population," owing to the later extinction of the other lines, the former became with their branches the only proper Family of the name in Scotland.

* Cal. vol. II, p. 184.

† In an Exchequer *Compotum*, in her Majesty's General Register House, Edinburgh, between 9th July 1470, and 15th June 1471, there is an onerate in respect to the "relevio" or relief duty of "Wester *liliscleif*" and "*Quhittoune*" *(Whittune)*, the identical lands in David's charter—thus still styled as originally—"regi debito per saisinam datam Jacobo *Riddale*," he thus being feudally entered as a tenant *in capite* therein. And subsequently, he, as "James of Riddale of yat *ilk*" *(Riddale)* witnesses among other deeds, a discharge dated November 9th 1479, by Margaret Ker, to her uncle Andrew Ker, of Cessford, ancestor of the Roxburghe family, (Roxburgh charter chest.) By various authorities then and thereafter beside me, the family, while "Domini de Lilislive," and "Quhittoune" as is established above, had always the personal title or designation "of Riddell" which had thus confessedly no reference to the lands. *But* the next evidence proves the *change* effected in respect to the *denomination* of the latter, *from* the family *surname*. Retour upon Record, September 6, 1636, of "Dominus Walterus Riddell *de eodem (Riddell)* miles Baronettus" inter alia, in parts of "Wester *Lillislie*, (or *Lillislive) quæ* terræ de Riddell *vocantur*"—and with the lands of *Quhitton* are said to be united "in Baroniam de *Riddell*." Other Retour (also upon Record) September 22, 1669, of Sir John Riddell "*of Riddell*," Baronet, *inter alia*, in the said estate of "Wester *Lillislie, nunc* Riddell *nuncupata*," which also forms part of the Barony of Riddell. The title of that ilk applied in Scotland to the head of a family, is often without reference to land.

I may here add another previously illustrative authority that should have been given earlier. On November 12, 1510, at a Court of the Lord Justiciar of the Kingdom, held in the south, "Dominus *de Riddale* sæpe vocatus, (as a tenant *in capite*), pro *secta* terrarum de *Lilliscleif*, et non comparens, (is found at the moment to be) in amerciamento, *defectu* secte." But nevertheless the record adds, that the fined party "retituitur, *quia terre* de *lilliscleif*, et de *Wythwnys (Whittunes)* (solely forming again the estate) tenentur pro *servitio unius militis*." (Original Justiciary Register for the time.) While the *distinction* between the surname and lands is thus again plain and palpable, the old charter by David I, the original and ruling warrant of the tenure, and *literally* carrying the *lands* just as represented, is evidently in view and acted upon; by which, as has been seen, the *same* were held only "*per servitium unius militis*." (See p. 109,) and whereby, no suit or attendance at Head Courts being thus exacted, the vassal and heir at the time in question (John Riddell of Riddell) might claim exemption, as he did successfully, from such feudal burden.

were to look not *very far* from us, we would obtain a far better illustration of an old family *only* taking their surname from lands. The Innesses of Innes, in Morayshire, (of whom I believe Mr. Innes is said to be a cadet,*) first heritably obtained by grant of King Malcolm, the grandson of David I,—according to Sir James Dalrymple, before 1164,†—but at any rate considerably subsequent to the Riddell Charter—the lands of Innes in the above district, in the person of one *Berowaldus Flandrensis*, who was thus a stranger and foreigner, as is indicated by the adjunct. During his epoch, and of course long posterior to that of Riddell being quite fixed and immutable—as well as thereafter—the family had properly no surname. They only thus used and rejoiced in the *christian* name of the Flandrian—all that was here known of him. Indeed even down to 1226, their representative, Walter the grandson of the said Berowald, in a confirmation to him of the lands of Innes, is exclusively designated "Walter, the son of John, the son of *Berowald* the *Flandrian*.‡" The surname, when they began surely to have one—dating from thence,‖ was taken *ex necessitate*, from the fief or lands of Innes, the only way they could practicably, to avoid such awkward and circuitous periphrasis as above, be marked out *de plebe*, and defined.—This shews it was in the strictest sense local and derived by the original settlers, not from themselves, but from their property they acquired in Moray; hence rendering this instance a complete exemplification of what I premised—and obviously of that which Mr. Innes attempted so irrelevantly to illustrate in the utterly repugnant case of Riddell, with respect to Roxburghshire.

Family of Innes a good instance of a surname, *solely* taken from land in Scotland.

* For the sake of strict accuracy however, I must add I have not seen proper or regular evidence of the fact.

† Collections *ut sup.* ps. 424-5. Like most old charters, that in question has no precise date, though it refers in this way to "Natali Domini proximo post concordiam Regis et Sumerledi,"—the latter the Lords of the Isles—which intimation has given rise to speculation. From what Lord Hailes here remarks, the grant must be after 1157. See Annals, Edit. 1797, Vol. I, p. 115. Malcolm, the successor of David I, (through Prince Henry his eldest son, who had predeceased,) reigned from 1153 to 1165.

‡ See Forbes of Culloden's History of the Inneses from the Family vouchers and Papers, where he gives (at p. 11), such confirmation by Alexander II, in the above year "Waltero filio Johannis' *filii Berowaldi Flandrensis.*"

‖ In deeds of subjects in the Chartulary of Moray, there are unconnecting and meagre notices of "*Walterus* de *Ineys*," so simply styled—latterly with the addition of dominus in 1226, 1232, and 1235, &c. but while his issue again do not transpire, it is singular, that nowhere in that Register, which may be called their native Chartulary, do I meet any Innesses witnessing Royal Charters, nor indeed elsewhere, in such capacity (as yet,) in any charter or record during at least the 13th century.

If we were to indulge in a little hit against the learned gentleman,—in Bothwell's expressive words in reference to Sir James Melville, to "find a pin" for his "boir,"*—and to contrast further the two cases of Innes and Riddell,—however odious comparisons may be, as perhaps he too may think;—I still neither might have the worst of it,—no more I believe than in some topics of disceptation in this performance. For, while the *unsurnamed* Berowald,—the *naked* Berowald, and Innes patriarch,—the father of obscure descendants, *un*-witnessing Royal grants,† was an utter stranger, who literally introduces himself subsequent to the middle of the 12th century,—we not only find *various surnamed* Riddells in Scotland, continually witnessing such, nay of rank and eminence to boot, at its very beginning; but their *identical surname* moreover figures even earlier in England, as attached to a Baronial Family there,‡—not to add expressly entered in the list of those of the Norman followers of the Conqueror.‖ Nor is it less remarkable, that instead of proving so secondary and subaltern as the Riddell impugner would inculcate, it *even* turns out to have been held of *some* account in the sister kingdom; inas-

Families of Riddell and Innes contrasted.

* See Melville's Memoirs, last Edit. p. 178. "Boir," is the same as "*bore.*"

† Forbes gives this account of them in his interesting Family Biography,—"To Berowald, succeeded his son John, and to John, succeeded his son Walter, of whom I have no more to say, *but* that they succeeded each other." (Hist. of Innesses, *ut sup.* p. 11.) If some wight should be here chagrined, and observe this is no more interesting than the history of an oyster on the Black Rocks of Leith, I cannot help it; I must still do what Mr. Innes does not always do, go by authority; for I cannot, like Douglas, in the case of the Monk Hamilton, (see p. 76,) venture *myself* to re-cast, or gild the Innesian ancestry.

‡ See among other Authorities, Dugdale's Baronage here, Vol. I, p. 555, under the head of "Ridell," where Dugdale specially mentions their representative in 1107, Geoffrey Ridell, "an eminent and learned person," who married Geva, daughter to Hugh, Earl of Chester, and who, among other of the nobility in attendance on Prince William, son of Henry, perished at sea, together with the latter, in 1120, &c.

‖ As proved by the following, among others, with this title prefaced in Leland's Collectanea, Vol. I, p. 206. "Et fait a savoir que toutes cestes gentez dount Lor *sornouns* [*surnames,*] y sont escritz vindrent ove Willm. le Conquerour, a de primes;" *(after which follow near the head of the list,)*

"Argenteyn et Avenele
Ros et *Ridel*
Hasting et Haulley," &c.

Ridel is here as a surname, spelt precisely as in the case of "Gervasius Ridel," when witnessing the *Inquisitio* Davidis in 1116; see printed Chartulary of Glasgow, Vol. I, p. 5-7. As to the accompanying "Avenele," more hereafter; hence Ridel is explicitly proved an existing surname even at the Conquest.

much as the Bassets, rather old English Barons as has been thought, who came by intermarriage to be female representatives of the English Riddells, not only took the arms of the latter, to the complete exclusion of their own, but also abandoned in like manner their own surname for the special one of Riddell,*—which, according to Mr. Innes, only latterly and obscurely originated in Roxburghshire.

Gervasius, and Walter de Ridale have obviously, like other Anglo-Normans, been brought as Colonists by David I to Scotland, whose charters, and those of his immediate heirs respectively, with Walter fitz-Alan, the first Stewart, and such foreign settlers, they often witness.† It has been shewn too, that the Avenels and Ridels were among the Norman followers of the Conqueror; and it curiously happens again, that they both start up in the contiguous counties of Dumfriesshire and Roxburghshire, and as repeated benefactors of Melrose in the 12th century, as is proved by the Chartulary of Melrose, with a reciprocity even in the christian name, there being then a Gervase Avenel, as well as a Gervase Ridel,‡ from which we might likewise infer a mutual relationship.

* See Dugdale's Bar. Vol. I, pp. 555-378; also Dugdale's "Antient Usage in bearing Ensigns of Honour" or "Arms," Oxford 1682, pp. 19-20, *et seq.* In the last Work, *(ibid.)* Dugdale specifies Geffrey Rydell the eldest son, and the male issue of two younger, of Richard Basset by Mauld Rydell, the daughter and heiress of the Geffrey Ridell, shipwrecked in 1120, who has been mentioned, (see p. 115 *n.*) and shews, while they were respectively provided out of the property of their Mother, that they exclusively bore her surname and arms, with congruent and suitable "*differences.*" So just and technically correct were *these*, that he singles them out *alone*, as *fine* models, that ought to be adopted in such respects, especially in his time, when he wished to restore "the antient usage" of "Arms" to its original state of purity, that had been so contaminated by the modern, and which is the professed object of the publication. The above Mauld Rydell, as set forth by Dugdale, gave, *inter alia*, the Barony of Weldon, to Richard Basset, or Rydell, (in her right) her second son; and is proved elsewhere to have been the founder, with her husband, of the Abbey of Lande, in Leicestershire.

† See Chartularies of Glasgow, Melrose, Kelso, &c. &c. &c. Hugh Riddell, too, the admitted ancestor of the Riddells of Cranston-Riddell, witnesses King Malcom's confirmation of the office of Stewart, with the Barony of Renfrew, and other lands, to Walter fitz-Alan, the first Stewart. See Andrew Stuart's Hist. of Stewart's, pp. 4-6.

‡ See printed Chartulary of Melrose, Vol. I, pp. 30-2, 33-5,—also Caledonia, Vol. I, pp. 513-14. The principal property of the Avenels is thereby proved to have been in Eskedale. A Charter by King William is witnessed by "Roberto Avenel,—Waltero filio Alani *Dapifero*,"—and "Waltero Ridale" Chart. *ut sup.* pp. 12-13; while Gervase Avenel and Walter Ridale witness together another, during the same reign, *ib.* pp. 127-8. Though the Avenels figure frequently in the old English Records, yet they were not summoned to Parliament, or figure like the Riddells in Dugdale's Baronage.

There is besides, a sad anomaly and contradiction of Mr. Innes in his comments upon the Riddells,—likewise not unprecedented elsewhere. He comprizes them *originally* when in Roxburghshire,—and as must follow at the sametime from his account before obtaining a surname,—under the denomination of "*Norman* settlers."* Pray, I would ask how can he possibly conclude the *latter* fact, without the clue or aid of their *Norman* surname, which can alone let him into this *Norman* secret? And if so, we have farther proof even from this his suicidal admission, of its not being, as, with the same breath, he yet affirms, taken from Roxburghshire, but *e contra*, derived from Normandy, or abroad.

I fear extremely I have been by far too tedious and prolix in what I have ventured to offer, in a matter that may appear secondary, or uninteresting to many, and therefore to avoid this further imputation in a more aggravated shape, I shall desist for the present.†—Upon the general conclusions, in reference to Mr. Innes, that may be now obvious to most of my readers, I will not expatiate, being unwilling to deal too harshly, or judaically with him. He no doubt, to use the language of Crawford, as applied to Robert II and Elizabeth Mure—as he indeed in effect avows—is "passionately in love" with the "beautiful ladie,"‡ Genealogy, who, yet like most young beauties—however unlike Elizabeth—may be at first, (as we have perchance seen), rather coy or obdurate, and may not meet his suit or advances with equal ardour. But he must nevertheless not lose heart or be disconcerted, for that, it is said, never won a fair lady: he must strenuously and devotedly pursue her—as must be now evident, even with greater study and assiduity than before, until he fairly, by his skill and address, overcome the capricious nymph in the *Atalantan* race, and pluck the rose from her chaplet.

* See p. 109.

† Upon the "Moravian topic," to shew, contrary to Mr. Innes, how little admitted connection, or concordance in a mutual origin and descent there was on the part of the Morays of Abercairney, *qua* Morays of Bothwell, in reference to the Murrays of Tullibardin or Athol, I have inserted, in the Appendix under No. IV, certain excerpts I since find I have, from a MS. history or account of the former, written more than a century ago, entitled, "Memoirs of the ancient *Moravii*," &c. to the year 1731, and referred to as being in Abercairney charter-chest. They are somewhat striking and amusing, bearing the characteristics of the manners of the time; while they evince the impression of the family—so far as that goes—of their being descendants of the house of Bothwell—nay, the male representatives.

‡ See p. 21.

Is genealogy legally or practically useful?

It would be great affectation to deny that I too am partial to the pursuit of genealogy or family history, though I, in truth, clung to it originally more as a "hobby," if I may use the term, without being well able to discover the utility or exact reason of the thing. But I now perceive it may be essentially practically useful in three rather important respects.

I. In reference to general history, which occasionally, by accounting for human actions, originating, as they not unfrequently do, from mere private bias, descent, family aspirations,* and connections, it in no small degree illustrates and explains—besides affording a convenient and interesting chain and link, whereby to connect more easily and agreeably in the mind various important historical facts and details. Nor is it less obvious, that the pursuit is often especially useful *in antiquis*, in checking and fixing, through facts and occurrences in families, material dates indispensible to argument. Even the date likewise of the original Innes charter, the first *terminus a quo* in the Innes pedigree, "natali domini proximo post concordiam *regis* et *Sumerledi*,"—has thrown new light upon a matter of history, inasmuch as proving that there had been an *intervening truce*,† before unknown, in the remote struggle and warfare between these parties, that ended, however, in the destruction of the latter in 1164.‡

II. True and correct genealogy and family history is, moreover, serviceable in developing and explaining our ancient consistorial law, in a manner identified with hereditary succession, and that still rules in many respects—but of which the records have so lamentably suffered by the Reformation. *Exitus acta* probat; and in such extreme dearth, the continuation, subsequent line, and representation of a family, as turns out by the pedigree, following a somewhat obscure consistorial process, of which the leading facts are yet known, whether of mere marriage, or status, or of both, may fix or illustrate the issue, and that necessarily of the

* Even the proud motto "*Esperance*," in the house of Bourbon, when but a branch, and before attaining the French sceptre, strikingly indicates their ambition, and firm resolution, in no way to lose sight of distant eventual rights inherent in them, or to compromise the privileges of their birth by the *imprevoyance* and negligence that shipwrecked and nullified such in *toto*, in the next stock of the Princes of Courtenay.

† And accordingly, Lord Hailes has acutely thus turned the notice to account. See Annals under the year 1157, Edit. 1797, Vol. I, p. 115.

‡ *Ibid.* p. 121.

legal points contested;—while even the preceding in the abstract must alone decide the existence of the impediment to legitimacy—or attaching illegitimacy or bastardy—arising from the forbidden degrees of relationship before the Reformation; which, notwithstanding Mr. Innes's new and liberal rule of the law of nature to their exclusion, must still, I conceive, *reddendo singula singulis* hold and be respected during the period.

III. The same qualification may much aid, nay indispensably rule in the matter of accuracy, and printing correctly the names of persons and places,* (if that be deemed advisable,) in ancestry records, so directly identified with just knowledge of old descents, individual representations, and relative possessions—in other words, family pedigree—taken with the occasional uncertainty as to strict orthography that must obtain more or less in *antiquis*, through the use of general contractions, and the known ambiguity and flexible character of certain letters. Here, as might be expected from ignorance of the pursuit in question, there has been a great deal of error and misrepresentation, as I often find in perusing modern printed records—above all, the late edition of "The Ragman Roll." I must confess too, I am not partial to those arbitrary artificial devices recently created to express the shades of contractions, which may clearly, from misapprehension as above, in certain instances, not convey the true import of the original words, that had far better be given in their exact natural state, as much as possible, uncompromised, and unmodified by such constructive *extra* ingrafting.

In nearly concluding these lucubrations, I am sure I need not at the sametime add my testimony to the great benefit that has generally resulted from the printing and publication of so many old MSS. by the respective Scotch Clubs and Associations, instituted for that purpose—it being so obvious. They have assuredly done a great deal, and merit every praise and eulogium, and I only hope that their labours, instead of being any way interrupted

* The pronunciation by the community of Scotland is singularly here sometimes useful. Our lower orders have a love for the old nomenclature, and so far are better antiquaries than the higher, in certain instances observing and retaining the same long after it has been forgot or superseded by the latter. To give an example, the district of Annandale in Dumfriesshire is pronounced by the vulgar Annan*der*dale, which turns out to be the real orthography of a designation so much identified with the illustrious house of Bruce, in *ancient writs*.

or relaxed—of which fortunately there seems no symptom—may continue with the zeal and ardour that has hitherto characterized them.

But perhaps they may be disposed to admit that the more spotless and unexceptionable their publications may be *in toto*, the better; which hence, instead of rendering my somewhat expurgatorial efforts so far, obnoxious, may on the contrary, find favour for them,—the same that with such professed view, might equitably attach to any, from whatever quarter.—It is by the way singular, while Mr. Innes devotes such an immense space to the Preface of the Chartulary of Holyroodhouse, nearly all engrossed with the subject of the Palace, he has merely twenty-six pages —meagre enough—for that of the Chartulary of Dunfermling, though in the locality of the prolific and important " Kingdom of Fife," associated with so many interesting facts and details. Neither does he give in the former, the oldest notice of the building of the said Palace, there being an older than what he alludes to in the Treasurer's Records in 1490,* in the shape of a payment of ii^{l} xiiii^{s} " to ye *masonis* of ye *palis* in drink-silver." I have neither further time at present, nor could the limits of this work permit my diverging to other topics in the Preface to the Chartularies, having selected, as premised, that which appeared to be a favourite, and much cherished one by Mr. Innes. At the same-time, in conclusion, I may advert to a single remaining matter, as I may thereby be enabled to vindicate in part two individuals from a rather unqualified reflection and condemnation of Mr. Innes.

Term " herbergare" in David the First's foundation charter of Holyroodhouse.

Every modern antiquary knows the misconception that arose in the minds of our forefathers in respect to the import of the barbarous and unclassical term " *herbergare*," in David the First's Foundation Charter of the Abbey of Holyroodhouse. The Monarch, *inter alia*, granted to the monks " *herbergare* quoddam burgum inter *eandem ecclesiam*, (the *Abbey*,) et *meum burgum*" (*Edinburgh*,)† that is, rendering " *herbergare*" as the infinitive of a verb, and according to its barbarous feudal import,‡ to *build* a burgh, (thereafter called the Canongate,) in the locality mentioned ; though the vocable came to be misconceived in later times,

* His first is not till 1501. † See Regist. Roll, iii, ps. 184-5.

‡ Of course its signification is only to be found in such glossaries of repudiated and barbarous Latinity as Du Cange, who renders it " domum construere, ædificare," &c.

previous however to the Reformation, and viewed by the monkish authorities as a substantive, nay actually to designate a burgh of the name of "*herbergare*," or by corruption "*abirgare*," that was supposed to exist in the time of David I, and had been made over to Holyroodhouse, in virtue of the preceding clause. At a much later era still, Dempster, who died in 1625, and Maitland, (in his History of Edinburgh,) last century, not unnaturally adopted the idea and *appellation;* upon which account Mr. Innes, who, like most antiquaries, is not at all indisposed to a hit, when it may be practicable, lifts up his hands, and expresses his astonishment at such *unscholarlike* misapprehension and conduct on the part of Dempster.* But in answer to this, (1.) it is not at all surprizing that he, thus a classical scholar, should not have perfectly apprehended the nature of such an uncouth and barbarous word as *herbergare*, that must, if a classic, have been utterly unknown to, and quite banished from his correct vocabulary. The error, so far from being strange, was just what might have been expected from a scholar,† who, therefore, finding no information or insight into the point from his own sources and oracles, was bound to have recourse to other and secondary lights; and (2.) this was far more excusable still, when we find that the misconception was actually homologated, and directly recognised and confirmed by preceding lawyers (as must be presumed) and the highest constituted authorities. In such a matter of old obscure and anomalous latinity,—where there was only a choice of difficulties —what was Dempster to do, but as I have premised, to confide in, and follow the latter who were ostensibly the most relevant, and best accessible native guides? And in full proof of such special acceptation of *Herbergare* by them, I have only to appeal to a Royal Confirmation of Queen Mary, so far back as the 8th of February 1559, (thus before the epoch when Dempster figured) whereby she confirms a charter of feu-ferm made by the late William Abbot of Holyroodhouse to Thomas Bellenden of

Held the *old* name of the *Canongate.*

* "It astonishes us to find a *scholar* like Dempster falling into the same error," (the *above*) Preface to his edition of the Chartulary of Holyroodhouse, p. xviii.

† Such a one, too, owing to the *peculiar* nature of the Latin of the middle ages, could not well say whether "herbergare" was a verb, or substantive; and under which category it exclusively came. It might have been as much the latter from the termination, as "*luminare*" that was undoubtedly merely a substantive, and denoted a light. See Du Cange under *luminare.*

Auchinoule, of all and whole "lie *canon-mylnis*,* terris sive croftis molendinariis &c. unacum lacu, aqueductu, astrictis multuris &c. et devoriis omnium et singularum terrarum tam *burgi vice-canonicorum*, ALIAS ABIRGARY *nuncupati*, quam totius baronie de brochton."† This evident corruption of "herbergare" into "*abirgary*," might further also have misled Dempster and Maitland. I need hardly add, that owing to the *received conventional* import, although through perverse acceptation, of many terms, we are still bound, throwing pedantry and fastidiousness out of the question, to observe and pay respect to it, and have some bowels of mercy for their employers,—however solely originating in ignorance, and in the vulgar. He would rather be a queer mortal, who, *vice versa*, under countenance of the just notion that what we call America, was not discovered by *Americus*, (Vespucius,) but by Columbus,—dogmatically refused to employ the previous designation, because thus strictly unfounded; and would not receive any valuable gift addressed to him at the "Bull and Mouth," London, because that equally with the supposed town "Abirgare," was a mere ignorant and ridiculous misconception, the true name of the inn or "hostellary" in question being the "Mouth of *Boulogne* harbour," from a noted sign it formerly bore.‡ In like manner, analogously with such punctilious rule, through which Dempster rather receives scrimp justice—as also the later Maitland—from Mr. Innes, an antiquary formerly would have angrily disdained to look at "Queen Blearie's cross," in Renfrewshire, (when it stood,) because, however curious, that was not its proper name,—because it had nothing to do, as represented, with any "Queen Blearie," or the mother of Robert II, but was more likely the cross of "Cuiné Blair,"‖ that fell to be quite otherwise explained, and had reference to quite a different matter. Upon the same principle, too,

* The noted Canon-mills, now nearly in Edinburgh.

† Register of the Privy Seal. Dempster makes "*Abergaire*" the old name of the Canongate.

‡ "The Bull and Mouth Inn," says Pennant in his London, "must not be passed by on account of the wonderful perversion of the name. It originally signifies the mouth of Boulogne Harbour, which grew into a popular sign after the costly capture of that place by Henry VII." See that work p. 224.

‖ The "Memorial of Battle." See Lord Hailes' amusing and well known dissertation about "Queen Blearie" and "her cross," by the way signally disproving the credit of tradition, to which subject the learned Judge pointedly alludes. Annals, Edit. 1797, Appendix, Vol. III. p. 59, *et seq.*

he would never have called the cross Queen Blearie's, or understood it by that name, although in fact the only one—somewhat after the fashion of "Abirgare"—it was then cardinally held to own.

It has just struck me, if the *Palace* of Holyroodhouse was to hold such an overwhelming space as it does in the late edition of the Chartulary of the *Religious* House of "Holy Cross," why not rather more appropriately *prefer*, in its description, whatever might be of a corresponding *religious* kind *within* the walls of the former; and yet it surprises me again, that Mr. Innes has no notice of such a thing. In reading his *prefacial* account to the Chartulary, we find nothing tangible there, *quoad sacra*, but the Abbey, although otherwise rather unduly superseded by the Palace. But James IV, when he built that structure, had not been so unmindful of *its internal* religious calls; for we have this intimation through a royal charter upon record, dated December 18, 1506, that he then mortified twenty marks yearly, "ad sustentationem unius capellani perpetui ad altare beatissime Virginis Marie, et Sancti Michaelis archangeli, in *nova capella regis*, *infra Palatium*, *juxta* Monasterium Sancte Crucis, prope Edinburghe, per regem *fundatam*."* The grant received, too, the special sanction of a Parliamentary Confirmation in 1509, which adds, that the said chaplain, "to sing in ye chapell wytin *his (the King's)* palace of halirudehouse," was to have the emolument moreover, for "ye kepin of ye sade palace."† It is hence certain, that a chapel had thus been instituted, *semel et simul*, with the Palace, agreeably to the uniform system elsewhere upon such occasions, indeed even at Stirling, whose Chapel-Royal was famous, and of great repute. Not a word, however, of the above, transpires from Mr. Innes's Holyroodhouse narrative, among much irrelevant details, though under the system and method adopted by him, there ought to have been most prominent mention of it, deeply influenced withal, as he represents himself, *by* "the *religion* of the *place*," *(Holyrood Palace)*,‡ which, he adds, "it is *in vain*—to *resist*;" but *whose* very *shade* seems here unfortunately to escape him.—"*Et* gracilis structos *effugit umbra* locos." It curiously turns out, that though irresistably attract-

Proper Chapel Royal of Holyroodhouse unknown to Mr. Innes.

* Great Seal Register.

† Acts of Parl. last edit. Vol. II, p. 267.

‡ See Preface to Chartulary of Holyroodhouse, p. lxxix.

ed by " the religion of the place," he quite overlooks, or discards, *what* (the *chapel*) alone constituted its religion—a *fortiori* in a Court ! Nay, we would be led to suppose from him, in such apparent state of happy ignorance, that there never was anciently, unless without the aid or contribution of the Abbey, any separate independent Palace Chapel.* All this, however, may be remedied in the second edition of the Holyrood-house Chartulary.

* *Ibid,* pp. lxxv–xxxvii.

Abercrombie Peerage.

(Though not within the precise bent and ostensible limits of this performance, the following original notices of a claim to the Barony of Abercrombie in 1738-9, *may be here added, as supplemental to another work, partly upon Peerage Law,* recently published by the Author.)*

THE dignity of Baron Abercrombie was conferred by Patent, dated December 12, 1647, upon Sir James Sandilands of Saint Monance, of a younger branch of the noble Family of Torphichen who sprung from the latter before 1500, with limitation to him, "ejusque hæredibus masculis ex corpore suo."† A specialty attempted to be drawn incidentally, from the context of the patent, will be noticed hereafter, though held to be immaterial.

The male issue of the Patentee would appear to have failed before 1695, in the person of his son, the second Lord, when Sir James Dalrymple, in his preface to his edition of Camden, states that the "honour is not now claimed by any,"‡ though with that negligence and want of due precision that is often discoverable in our Peerage economy and proceedings, it was still continued upon the Union Roll.‖

Nevertheless, in 1738, and thereafter, Thomas Sandilands thought himself entitled to the dignity of Lord Abercrombie, which he even assumed upon a retour or service ascertaining his propinquity as a collateral, and not lineal heir-male; to which latter class of heirs however, the dignity, *ex terminis* of the patent, may be held only to be limited. And his claim and pretensions, which were never regularly or deeply canvassed before any Tri-

* Peerage and Consistorial Law, Inquiry into, &c. Edinburgh 1842.

† Great Seal Register.

‡ See p. 126 of the work.

‖ See Robertson's Peerage Proceedings, p. 15.

bunal,—however incidentally mooted before the Lords in 1739,—may be gathered from the four documents or *Pieces*, to use a French relative term, that follow :—

1. Original Letter, dated February 24, 1738, and subscribed "*Abercrombie*;" addressed to the then Lord Torphichen in these terms. " My Lord, T'will undoubtedly be some surprize to yourself, and I assure you my Lord, 'tis no little concern to me, that I am forced to give your Lordship the trouble of this application; but the finesses of some of our ministers here, who fish for delays to solicitations they seem to have but a small inclination to comply with,—lay me under the necessity of asking an additional favour of your Lordship, or of putting myself to a more extraordinary expence then I am at present equal to. It must be at the extravagant charge of sending for hither, coppies of all the records and proceedings relating to the making out my right to, and taking *up* the *titles* of my *family* to prove to my Lord Isla,* that I am Baron Abercrombie, unless you will be so good, my Lord, to give me your Lordship's attestation of these facts in a letter to my Lord Isla, which will be equally satisfactory to him. I assure myself from your Lordship's known humanity and goodness to all mankind, and from your particular friendship for me, that your Lordship will readily excuse all this, and even when I entreat you, my Lord, to be as full upon these heads, and as expeditious in a return, since my preferment and provision in life are immediately depending upon such a return as your Lordship's more important affairs will admit of; after which, I have nothing further to beg, but that your Lordship would allow me solemnly to declare that I shall make it the business of my future days to testify the high sense I have of the great obligation I shall be under to the Lord Torphichen, and how much I ought to be, my Lord, your most obedient humble servant."† The letter subscribed, as stated, " Abercrombie" is dated " Bow Street, Covent Garden," and has, farther, this postscript, " After what I have asked above, I cannot ask a line in my behalf to my Lord Hyndford here, tho' it would be of the utmost service to my affairs."

2. " Memorial *(in the hand-writing of Crawford the Peerage*

* Archibald, afterwards third Duke of Argyle, a statesman well known in his time.

† Torphichen charter-chest.

writer,)* anent the title of the Peerage of Abercrombie *(in)* 1739."

"That the claimant of this peerage, Mr. Sandilands, is heir-male of the family of St. Monans, afterwards raised to the honour, title, and dignity of Lord Abercrombie, is not a question,—that having been cognosced by an Inquest before the Baillie of the Regalitie of the Canongate† as from the extract produced. By that service it is evident that the claimant of this peerage is a great Nephew of the first patentee by his brother William Sandilands, Esq. younger son of William Sandilands of Saint Monans, and brother to Sir James Sandilands of St. Monans, whom his Majestie King Charles the first was gratiously pleased to raise to this honour and dignity of Lord Abercrombie by letters patent bearing date the 12th of December 1647,‡ *ejusque heredibus masculis de corpore suo legitime procreatis.* The dignity of the Peerage is given and granted to Sir James Sandilands, the Patentee, the great uncle of the claimant, *hœredibus masculis de corpore suo procreatis seu procreandis* in the *dispositive* clause of the charter. *But* in the *Tenendum* of the patent, Tenendo *dictus* Dominus Jacobus Sandilands Dominus Abercrombie et *heredes sui masculi* dictum titulum Honorem, gradum et dignitatem. From this second clause in the patent, a doubt may arise in favour of the claimant, whether or not failing the heirs-male of the Patentee, which actually happened in the person of his son the second Lord Abercrombie, the second clause do not carrie the honour to the heirs-male of the patentee, which the claimant is, upon the general clause of *heredes masculi*, as is contained in the patent, and whether or not the word or particle *quibuscunque* be not understood though yet not expressed. The resolution of this point,

* See p. 20. This memorial is, with other lucubrations of the same antiquary, who was also Historiographer of Scotland, in the Advocates' Library.

† Before whom latterly many lax and preposterous services or retours have been attempted and *dispatched.* A service or retour, however, according to our old practice, was the mode adopted by Scotch Peerage claimants to establish their pedigree, and the requisite extinctions. Indeed it continued long after the Union, and so far from being questioned, was fully admitted, and acted upon by the House of Lords. Whenever there is a means of opposition, as for the most part, no injury can ensue therefrom, because there is always the cure and remedy of a reduction, competent before the higher tribunal;—the untowardness and difficulty is when that does not obtain.

‡ The original patent is registered and recorded in the Chancery Office at Edinburgh, where it may be called for, and seen, if necessary, by any party concerned.—(This is Crawford's Note to the Memorial.)

upon which the stress of the claimant's right and title to the Peerage chiefly depends, requires much greater skill in law than I can, or do pretend to, and therefore I apprehend it is fit and proper to lay this memorial before lawyers, that they may give their opinion, how far the claimant's right can be founded upon that clause of the patent, *heredibus masculis*, failing the heirs-male of the patentee's own body, without the adjection of the particle *quibuscunque*. All that I shall further take notice of is, that it is a received maxim, that every deed, grant, or concession from the Sovereign or the Crown to the subject, are always to be interpreted and understood in the most favourable and benign manner; for if the word *quibuscunque* were added to *heredibus masculis* of the patentee in the grant of the dignity, there would no difficultie remaine, but that the claimant was weel entituled to the dignity of Lord Abercrombie, as being great nephew to Sir James Sandelands, the first patentee."

3. Entries in the Lords' Journals, as follows:—"9 June 1739. —Upon reading the Petition of James Brooke and William Westbrooke, Esquires, Sheriffs of London and the County of Middlesex; setting forth, "that a *Capias* being issued out of the Office of the County of Middlesex, dated the 7th instant, at the suit of John Lockeys, Esquire, against *Thomas Sandelands*, therein also designed Esquire, and expressing a difficulty to know how to proceed against the *Defendant, he pretending himself to be a Peer* of this Realm," and praying that the House will give such Order therein, as to their Lordships shall seem meet."

"It is ordered, that the said Pettition be referred to the consideration of the Lords' Committees for Privileges, to meet on Tuesday morning next; and that the said John Lockeys, and *Thomas Sandelands*, do attend the said Committee."—

"*Die Martis*, 12*mo Junii* 1739.—The Earl of Warwick reported from the Lords' Committees for Privileges, to whom was referred the petition of James Brook and William Westbrook, Esqrs. Sheriffs of London, and the county of Middlesex, setting forth, that a *Capias* being issued out at the office of the county of Middlesex, the 7th instant, against *Thomas Sandilands*, therein designed Esq. and expressing a difficulty as to proceeding against the *defendant*, he *pretending himself to be a Peer of Great Britain;* and praying

that the House will give such order therein, as to their Lordships shall seem meet. That the Committee had met on consideration of the said Petition, and *were attended* by the *said defendant;* and having *heard him* touching the matter of the said Petition, are of opinion, That *no cause* has been *shewn* to the Committee why the Petitioners should not proceed in the execution of the process directed to them, mentioned in their Petition.

Which report being read by the Clerk, was agreed to by the House.

Ordered by the Lords Spiritual and Temporal in Parliament assembled, that the Lords of Session in Scotland, do make up a roll or list of the Peers of Scotland, at the time of the Union, whose Peerages are still continuing, and do lay the same before this House in the next session of Parliament; and that the said Lords do, as far as they shall be able, state in such roll or list the particular limitations of such Peerages. *(Sic subscribitur.)*

W. Cowper, *Cler.-Parl.*"

(In terms of the above—and in obedience to the last Order—as is notorious, was given in the Report of the Lords of Session upon the state of the Scotch Peerage, dated the ensuing 27th of February 1740.)

4. Remarks as follows by the Lords of Session upon the Abercrombie Peerage in the report alluded to, " That there appears in the records of the great seal, in the Chancery-office, a patent, *anno* 1647, granting the dignity of Lord Abercrombie to Sir James Sandilands, and the heirs-male of his body; but it does not appear, that either the patentee, or any successor of his, in that right, ever sat or voted in Parliament, neither has any one offered to vote in right of that Peerage at any election, general or particular, since the Union."*

From the above notices and authorities, it seems plain that Thomas Sandilands, the Abercrombie claimant, being an heir-

* The import of the patent is thus given by the Lords:—" Carolus, &c.—Dedisse, concessisse, et disposuisse memorato domino Jacobo Sandilands, ejusque heredibus masculis de corpore suo procreatis seu procreandis titulum &c. Domini; ac damus, &c. quod ille ejusque hæredes et successores prædicti indignitabuntur, et nominabuntur Domini de Abercrombie omni tempore futuro," Dec. 12, 1647.

male collateral only, as by his own shewing, could not be entitled to the honour, in terms of the patent in 1647, the limitation there to "heirs-male" being appositely controlled by the adjunct "of the body," which must ever decisively tell—and unfavourably—in whatever way occurring. As I have shown also elsewhere, even the limitation, "heredibus masculis," in our patents —quite unqualified—so far as clear intention at least went, in several cases, can merely be held to include *direct* heirs-male; which may further act prejudicially *semel et simul*, in the Abercrombie patent, where there, besides, really appears to be no favourable inference or presumption in behalf of the extended male meaning—*sed e contra*. And if such obtain, the narrow construction may be corroborated still, by the admitted occasional flexibility of the phrase, "heirs-male" in law, and its *sometimes* being only equiponderant to heirs-male of the body.

Report of the Lords of Session upon the state of the Scotch Peerage in 1740, its nature and weight.

The Abercrombie claim—the relative procedure upon which before the Lords is somewhat curious,*—would seem, as by the excerpts from the Lords' Journals, to have elicited as a preventative against undue assumption of dignities, the noted report by the Lords of Session upon the state of the Scotch Peerage in 1740.† That report has some good remarks, but is at the same time very defective, and imperfect in many respects, besides perpetrating some flagrant errors and misconceptions, *inter alia*, talking of the "ancient" Peerage of "*Innerkeithing*"‡ that never existed, and canvassing as valid and effectual still, the terms and import of the patent of the dignity of Earl of Monteith and Strathern in 1631,‖ though it was then, and is now a mere dead letter, from having been reduced and annulled by a process at the instance of Charles I. the previous granter, before the Court of Session in 1633. Neither is the report in question seemingly correct in what it even says regarding the Barony of Abercrombie, namely, that "it does not appear, that *either* the *patentee*, or any successor of his, in that night, *ever sat* or voted in Parliaments," when the Lord Abercrombie§ in 1648, is appointed by "the Estaits of Parliament" to be upon a committee "for the nobility,"¶ and

* See afterwards, under p. 132.

† For a full copy of the same, see Robertson's Peerage Proceedings, pp. 200–1, *et seq.*

‡ See Robertson, *ut sup.* p. 205.

‖ *Ibid.* pp. 206-224.

§ *Ibid* p. 214.

¶ Acts of Parl. last Edit. Vol. VI, pp. 327–8.

the Lord Abercrombie is upon the rolls for the Sessions of Parliament during the years 1670-1672, and 1673.*

What became of Thomas Sandilands the Abercrombie pretender in 1739,—whose circumstances do not appear to have been the most flattering,—I know not. His alleged descent *may* have been correct; and the Sandilands of Saint Monance, of whom he derived himself, were of old standing, and as I know, produced some cadets. Had the honours really gone to heirs-male whatever, they might *possibly* now be in Lord Torphichen, the head of the house of Sandilands, but holder of a far older peerage,—with which is identified the proud status of heir-general of the distinguished Family of Douglas. With regard to the Douglasses, I not long ago met with an original and interesting old charter without date, by "*Jacobus* de Douglas, filius et hæres domini Willielmi Comitis de Douglas et de Mar, dominus baronie de Onile, in Mar,"—in other words, the hero of Otterburn,—whereby he confirms a grant which "Johannes Ranulphi Comes Moravie, dominus Vallis Anandie, et Mannie fecit domino Patricio de Carnoto militi—de manerio suo de *Lunfannan* cum parco ejusdem."† But it has especially a seal of the young hero well executed, in fine preservation, the only one of his, I believe I have seen, exhibiting the Douglas arms, (the heart being uncrowned,) with the usual chief, upon which is a label of three points, not unlike what an elder son and heir-apparent might also bear at present.

Original Charter by the hero of Otterburn.

* Acts of Parl. Vol. VIII. Append. pp. 1-10-26.

† *Lunfannan*, not far from Midmar, and in the earldom of Marr, Aberdeenshire, is a remarkable historical place, transmitted to have been that where Macbeth was overcome and fell.—See Hailes' Ann. Edit. 1797, Vol. I. p. 3; Caledonia, Vol. I, p. 410. Chalmers adds there, that "*Macbeth's cairn* lies about a statute mile northward from the kirk of Lumphanan;" while, in the neighbouring parish of Tough, "there is a large standing stone, twelve and a half feet of perpendicular height," &c. to commemorate the fall of "*Macbeth's son*." The following is an excerpt of an old charter upon record:—"Omnibus, &c. Thomas Comes de Marr dominus de Caveris et de Garviache ac Camerarius Scotie, (by which he confirms), duncano filio Rogeri—terras de Abirgeldy, &c. in comitatu nostro de Marr—salvo forinseco servitio; &c. faciendo nobis inde tres sectas annutatim ad tria nostra *placita capitalia apud lapidem de* MYGBETHE *in cromair*." Witnesses, "Johanne Forbes domino ejusdem," Willielmo Keith Marshall of Scotland, Alexander Bishop of Aberdeen, &c. Though the charter be without date, yet Earl Thomas, the granter, last of the direct male line of Marr, principally figured in the reign of David II. Query, is the stone of *Macbeth* here, either of the previous ancient memorials, or has the stone of Macbeth's son been mistaken for his father's? I need not add, that Law Courts were thus anciently occasionally held in the open air, at some noted locality, and even at, or under a bridge, &c.

Original Charter in the 14th century, mentioning "*lapidem*" of Macbeth.

The supporters are two lions, and the crest a plume of feathers. The latter, the true supporters and crest of the House of Douglas, were carried besides, by Earl William his father.* I have been at the greater pains in noticing this grant, which is from the charter-chest of the ancient and knightly family of Burnet of Leys†—where there are also other attractive ancient muniments—owing to every remnant of so gallant a personage as the former being interesting.‡

Procedure of the Lords in the Sandilands or Abercrombie case.

On the preceding Sandilands or Abercrombie occasion the House of Lords took up a matter of Peerage in a manner *proprio arbitrio*, upon Petition of parties, without a reference from the crown, analagously, as in the noted case of the Earldom of Northumberland, in the first instance, in 1672, which was equally assumed by one having no right. The same procedure was adopted *cæteris paribus*, with respect to the Stirling Peerage, upon the 16th and 19th of March 1832.‡ By the English law and practice, power and authority from the crown might further have been requisite for the purpose, differently from ours, hitherto unrepealed, though lost, if it be so, by *non-user*; the Scotch Courts of Law being naturally entitled to originate Peerage matters, however subject of course to an Appeal to the House of Lords. This in many respects, I cannot help thinking a preferable method in a Scotch Peerage. In the Sandilands case there is this specialty, differencing it at least from that of Stirling in 1832, that the *titular* party complained against, was ordered to appear and be heard.

* I have many copies of seals of the house of Douglas. Perhaps those of the line of Angus are not the least striking and tasteful—though, at the sametime, the early ones of the Earls of Crawford are elegant and splendid. Every thing in this respect, including writing and penmanship, sadly retrograded after the Reformation.

† All shewn me with that liberality which, while it eminently distinguishes the existing representative of the Burnets, I have not unseldom experienced from the heads and chiefs of other old families.

‡ See my late Treatise on Peerage and Consistorial Law, pp. 852-3.

Appendix.

I.

DISPENSATION FOR THE MARRIAGE OF ROBERT II.—THEN ONLY STEWART OF SCOTLAND—WITH ELIZABETH MURE, IN DECEMBER 1347, AS GIVEN BY ANDREW STUART, THE DISCOVERER IN 1789, IN HIS HISTORY OF THE STEWARTS.—*(See Supp. p. 418.)*

" CLEMENS Epūs, Servus Servor, Dei, Venerabili Fratri.....
Episcopo Glasguen. Salutem, &c.

OBLATA nobis pro parte dilecti filij nobilis viri Roberti Dñi de Stratgnf,* Militis, et dilecte in Christo filie nobili mulieris Elizabeth Mox† (sic) tue Dioc. petitio continebat, quod dudum ipsis Roberto, et Elizabeth ignorantibus quod dicta Elizabeth, et dilecta in Christo filia nobilis mulier Ysabellam Boucellier,‡ domicella ejusdem Dioc. in tertio et quarto, ac Elizabeth et Robertus prefati in quarto consanguinitatis gradibus sibi invicem attinerent, idem Robertus dictam Ysabella primo, et postmodum predictam Elizabeth carnaliter cognovit, *et quod ipse Robertus et Elizabeth* DIU COHABITANTES, *prolis utriusque sexus multitudinem procrearunt.* Cum autem, sicut eadem petitio subjungebat, proles hujusmodi sic sit in universorum aspectibus gratiosa, quod ex ea carissimo in Christo filio nr̃o David Rege Scotie illustri, cujus dictus Robertus nepos existit, et ipsius Regis regno Scotie subsidia non modica sperantur verisimiliter profutura, nobis pro parte ipsorum

* There is reason to think that the word *Strathgnf*, thus written, has by mistake been written in the record in place of the word *Strath-grif*, which was the ancient name of the lordship of Renfrew, belonging to the Stewarts of Scotland; and accordingly the Stewart was sometime described Lord of Strath-grif or Lord of Renfrew. *Vide* Crawford's History of the Shire of Renfrew, and Macpherson's Geographical Illustrations of Scottish History, *voce Strath.* (Andrew Stuart's Note.)

† Evidently intended for Mure. ‡ Forte *Botellier (Andrew Stuart.)*

Roberti et Elizabeth extitit humiliter supplicatum, ut cum idem Robertus et Elizabeth desiderent invicem matrimonialiter copulari, et hujusmodi desiderium nequeant absque dispensatione Apostolica adimplere, providere eis super hoc de oportune dispensatione beneficio de benignitate Apostolica dignaremur. Nos itaque ex hiis et aliis certis causis nobis expositis, tuis ac carissimi in Christo filij ñri Phillippi Francie illustris ac dicti Scotiæ regum, nec non Roberti, et Elizabeth predictorum supplicationibus inclinati, Fraternitati tue de qua plenam in Dño fiduciam obtenimus per Apostolica committimus et mandamus, quatenus si est ita cum eisdem Roberto et Elizabeth, quod ipsi impedimentis quæ ex consanguinitatibus hujusmodi proveniunt, nequaquam obstantibus, matrimonium in facie Ecclesiæ invicem contrahere, et in eo postquam contractum fuerit remanere, licite valeant Apostolica auctoritate dispenses. *Prolem susceptam predictam et suscipiendam legittimam nuntiando.* Volumus tamen quod dictus Robertus aliquas, vel aliquam Capellanias, seu Capellaniam ordinare, fundare, ac dotare de ipsius Roberti bonis juxta tuum arbitrium teneatur, super quo ab eodem Roberto ydoneam recipias cautionem. Datum Avinione x kalen. Decembris, Pontificatus nostri anno sexto.

Exemplum suprascriptum superioris bullæ Clementis P. P. VI. descriptum est, et recognitum ex originali regesto ejusdem Pontificis, quod Rome in servatur in Archivo Secreti Aplico Vaticano; in cujus rei fidem hic me subscripsi, et solito signo signavi, hac die 4 Aprilis 1789.

CAIETANUS MARINI, Præfectus Archivi
S. S. item Archivi Arcis S. Angelo."

" The above dispensation, being dated in the sixth year of the pontificate of Clement VI. who was elected Pope the 17th of May 1342, it must have been in December 1347." *(Andrew Stuart's remark.)*

It is hence abundantly clear—in the absence, too, of all contradictory proof—that the antecedent connection of Robert and Elizabeth must have been merely that of incestuous concubinage; —in the face of which, however, Mr. Innes quite gratuitously espouses the notion of a formal marriage between the parties, previous to the above Dispensation.*

* See p. 19.

II.

FOUNDATION CHARTER BY ROBERT II. IN 1364—STILL WHEN STEWART OF SCOTLAND—OF A CHAPLAINRY, IN OBEDIENCE TO THE INJUNCTION OF POPE INNOCENT IN THE PRECEDING DISPENSATION, OBVIOUSLY AS AN EXPIATION OF HIS INCESTUOUS AND ILLICIT INTERCOURSE WITH ELIZABETH MURE.

Carta Roberti *Senescalli* Scotiæ, *facta uni Capellano in Ecclesia* Glasguen. *Ex autographo*, 1364. *(As generally given.)*

Omnibus hanc Cartam visuris vel audituris, Robertus Senescallus Scotiæ, Comes de Stratherne, Salutem in Domino sempiternam. Cum dudum venerabili patri domino Willielmo, Dei gratia, Episcopo Glasgwensi, fuerit per litteras Apostolicas specialiter delegatum, ut super Matrimonio contrahendo inter nos et *quondam Elizabeth More, dum ageret in humanis*, non obstante impedimento consanguinitatis & affinitatis, contractui matrimoniali praedicto impedimentum præstante, auctoritate Apostolica dispensaret, dummodo duas Capellas, vel unam, pro arbitrio ipsius Episcopi, perpetuo fundaremus. Ac dictus Venerabilis Pater, consideratis, in hac parte considerandis nobiscum super impedimento prædicto, auctoritate qua supra dispensans, nobis injunxerit, ut una Capellania in Ecclesia Glasguen. ad unum certum altare, ad pensionem decem marcarum Sterling. annuatim percipiend. de certis redditibus nostris fundaretur perpetuo ; nosque eandem Capellaniam sic fundare fideliter promiserimus, infra certum tempus jam transactum, nobis tunc per dictum Episcopum limitatum. *Noverit Universitas* vestra nos, *ex causa præmissa*, dedisse, concessisse, & hac præsenti Carta nostra confirmasse, pro nobis et hæredibus nostris perpetuo, Deo, B. Mariæ Virgini, B. Kentigerno, & uni Capellano celebranti, & celebraturo perpetuo in Ecclesia Glasguen. prædicta, decem Marcas Sterling. ad sustentationem ejusdem Capellani annuatim percipiend. de annuo redditu quadraginta librarum Sterling. exeunte de terra *Del Carse Abbatis*, infra Vicecomitatum de Stryvelyne, & novis & hæredibus nostris debito ; per religiosos viros, Abbatem & Conventum *Monasterii Sanctæ Crucis de Edinburgh. Tenend. Habend. & percipiend.* annuatim in perpetuum eidem Capellano qui pro tempore fuerit, per mans dictorum Religiosorum, ad terminos Pentecostes & Sancti Martini in

hyeme, per portiones æquales; in liberam, puram & perpetuam eleemosynam; adeo libere, quiete, plenarie & honorifice, sicut aliqua eleemosyna per totum Regnum Scotiæ, liberius conceditur, percipitur sive datur. Et nihilominus, totum jus nobis competens per cartam infeodationis, recolendae memoriae Domini Regis Roberti avi nostri, sive obligatorium dictorum Abbatis & Conventus, seu quascunque alias evidentias, ad compellendum dictos Abbatem & Conventum ad solutionem dicti annui redditus decem marcarum, in Episcopum Glasguen. qui pro tempore fuerit, & Capitulum Glasguen. sede vacante, per hanc Cartam nostram perpetuo transferimus, ipsosque & eorum alterum, quantum ad hoc, nostros, & hæredum nostrorum assignatos & assignatum facimus, constituimus, & etiam ordinamus. Et si forte contingat, quod absit, quod dictæ decem marcæ annuæ, per dictum Capellanum qui pro tempore fuerit, percipi non potuerint, ut est dictum; vel ex eo quod dicti Abbas & Conventus solvere noluerint, aut compelli non potuerint ad solutionem earundem; vel ex eo quod nos, aut aliquis hæredum nostrorum, contra præsentem infeodationem & concessionem nostram, solutionem dictarum decem marcarum impediverimus aut impediverit, aut per nos, seu alium vel alios, clam vel palam, directe vel indirecte, procuraverimus seu procuraverit impediri: Obligamus nos & hæredes nostros, per omnia bona nostra, mobilia & immobilia, ad solvend. dictas decem marcas, de aliis redditibus nostris, ubi Episcopus Glasguen. qui pro tempore fuerit, vel Capitulum ejusdem, sede vacante, duxerit eligend. toto tempore quo cessatum fuerit a solutione dictarum decem marcarum, percipiend. de annuo redditu supradicto. Subjicientes nos & hæredes nostros jurisdictioni & cohertioni Episcopi Glasguen. & ipsius Officialis, qui pro tempore fuerint; ut ipsi, per omnimodam censuram ecclesiasticam, nos & hæredes nostros compellere valeant ad perficienda omnia & singula supradicta, in casu quo defecerimus vel defecerint, quod absit, in aliquo præmissorum. Et ultra omnia prænotata, nos & hæredes nostri prædicti, donationem & concessionem nostram de dictis decem marcis annuis percipiendis, ut supra, de annuo redditu supra-dicto, prædictis Episcopo Ecclesiæ Glasguen. & Capellano qui pro tempore fuerint, contra omnes homines & fœminas warrantizabimus, acquietabimus, & in perpetuum defendemus. In cujus rei testimonium, sigillum nostrum, una cum sigillo Johannis Senescalli, Domini de Kyle, Primogeniti & Hæredis nostri, præsentibus est ap-

pensum. Hiis testibus, venerabili patre domino Roberto, Abbate Monasterii de Kylwynnyne, & dominis, Johanne Senescalli, fratre nostro, Hugone de Eglintone & Thoma de Fauside, militibus; Johanne Mercer, Burgensi de Perth; Johanne de Rose & Johanne de Tayt, armigeris nostris, & aliis. Apud Perth, duodecimo die mensis Januarii, Anno Domini, millesimo, trecentesimo sexagessimo-quarto.

[*No Seals nor Tagues.*]

III.

EVIDENCE OF THE TRUE STATUS AND CONNECTIONS OF SIR WILLIAM DOUGLAS OF LIDISDALE, THE "FLOWER OF CHIVALRY," AND THAT HE WAS NOT, AS REPRESENTED BY MR. INNES, A BASTARD SON OF THE GOOD SIR JAMES DOUGLAS IN THE REIGN OF ROBERT I. *(Referred to at p. 83.)*

THE proof I shall give numerically, with remarks, as follows:—1. Title of missing "Carta, to *William* Lord *Douglas* of the lands of *Lyddall, (Lidisdale,)* whilks William *Soulls* forisfecit," by David II, who reigned from 1329 to 1370, (Rob. Ind. p. 39, No. 3.) 2. Title of "Carta to *William* Lord *Douglas*, *younger*, of the baronie of *Dalkeith*," by the same Monarch, (*ibid.* p. 40.) In both these instances, however, William is erroneously, by the more modern transcriber, styled "Lord;" in the latter, as will be obvious in the sequel, he is called "*younger*," in contradistinction to his Father Sir James de *Laudonia*, *senior*. 3. Intimation by Fordun, that "Sir William Douglas," (whom Lord Hailes and the other authorities represent as of *Lidisdale,*) was captured by the English at the battle of Durham, in 1346, (Goodall's Edit. Vol. II, pp. 339-43, and Lord Hailes' Annals, Edit. 1797, Vol. II, pp. 240-1.) 4. Letter by Edward III to his Chamberlain of Berwick in 1349, alluding to "*Willielmus* de *Douglas* de Scotia, *prisonarius noster existens*," and stating, that before the battle of Durham he had been seised and in possession of the lands of *Lidisdale*, with its Castle of *Hermitage*, that had formerly belonged to *William Soules*, (Rot. Scot. Vol. I, p. 730,) see No. 1. 5. Safe conduct by Edward, dated December 16, 1350, for "Willielmus

de Douglas *de Lideldale, prisonarius* noster," to go to Scotland on business affecting David King of Scotland, and thereafter to return to England, (*ibid.* p. 737.) 6. Intimation by Fordun that *on Shrove-Tuesday* 1350, Sir David de Berkelay was assassinated by certain persons "*ex procuratione*, &c. *Domini Willelmi de Douglas, tunc in Anglia captivi* existentis, in ultione *Johannis de Douglas*, FRATRIS *sui*, et *patris Domini Jacobi* de *Douglas* senioris *de Dalkeith*, quem Johannem idem David fecit interfici." (Goodall's Edit. Vol. II, p. 348.) The above Sir William was obviously the then imprisoned Knight of Lidisdale in England, he being the only one of the name in that predicament; and in confirmation of the same thing, see No. 8, and what will also transpire. 7. Confirmation by David II, December 14, 1365, of a former grant in 1351, by "Willielmus de Douglas dominus Vallis de *Ledell*" to his "*nepoti*," *(nephew)* "Jacobo de Douglas," of the lands of Aberdour, that is witnessed by "dominis Andrea de Douglas avunculo meo," and "Willielmo de douglas seniore fratre meo." (Regist. Dav. II, p. 52.) This James was afterwards of Dalkeith, and heir of the Knight, being the James styled *senior* in No. 6, owing to having had a son of the same christian name, (see No. 10.) 8. Intimation by Fordun, that in August 1353, "nobilis *Willielmus* de Douglas *de Liddalisdale* vir strenuus in armis," was assassinated by William Douglas, afterwards Earl of Douglas, partly "in vindictam—mortis,—Domini *David* de *Berkelay*, (Vol. II, p. 348.) The latter, as has been shewn, had been dispatched at the instigation of the Knight, (see No. 6.) 9. Confirmation by David II in 1368, of renunciation of all claim by the said William Earl of Douglas, to lands in the Barony of *Dalkeith*, in favour of "quondam *Marie* de Douglas *filie et heredi quondam Willielmi* Douglas." (Regist. Dav. II, p. 65,) see also No. 2. This was the deceased daughter and heiress of the Knight of Lidisdale whose estates of course, she having left no issue, would go to James Douglas the nephew and eventual heir of both, (see too Nos. 6 and 7,) as is fixed by the next authority. 10. Original mortification dated June 1, 1406, by "*Jacobus* de Douglas *dominus de Dalkethe*," whereby he founds *six* chaplainries, "in capella nostra beati Nicolai de *Dalkethe*, with consent "domini *Jacobi de* douglas militis *primogeniti* et *heredis nostri*," and in memory "*domini* JOHANNIS *de douglas* PATRIS *nostri*, et domine Agnetis matris mee, DOMINI WILLIELMI *de douglas* DOMINI VALLIS DE LEDALL AVUNCULI NOS-

TRI, et MARIE *filie sue*, Agnetis, et egidie uxorum nostrorum, Johannis, *henrici militis* (*ancestor* of the present Earl of Morton,) thome, et Nicholaii de douglas fratrum nostrorum." (Kilsyth Charter-chest.) We have thus latterly proof that Sir William Douglas of Lidisdale, also of Dalkeith, the father of Mary, heiress of Dalketh, was *uncle* of James Douglas of Dalkeith and Aberdour, his nephew, and eventual heir, whose father at the same time was *John* Douglas, (see Nos. 10 and 7,) which tallies completely with Fordun's account in 1350, who further there adds, what must be already clear, that Sir William was brother of the said John, (see Nos. 6 and 8); so both statements completely agree, and mutually corroborate the cardinal point, that the Knight of Lidisdale was head of the Douglases of Dalkeith, and not of the "good" Sir James Douglas's *branch*, which was quite distinct. And independent of the above, the material pedigree, with the proof of Sir James Douglas *de Laudonia* being the father of the knight, is obviously corroborated, 1. by a charter of Robert I, "*Jacobo* de duglas *de Laudonia* militi" of the lands of *Kincavill* and *Caldorcler*; 2. by a charter of that King of *these very* lands to "*William Douglas*, SON to *umquhill* Sir *James Douglas of Laudon*,"*—(obviously the knight)—and 3. by a charter in 1374, fixing that the *said* lands of *Kincavil* and *Calderclere* were then *heritably* held by *James* Douglas *of Dalkeith*, the mortifier, in 1406. See No. 10 (for the previous authorities, see Regist. Rob. I, p. 12, No. 59. Rob. Ind. p. 23, No. 8, and Regist. Rob. II, p. 140, No. 73.)

The induction here must be, that James Douglas of Dalkeith having thus possessed Kincavil and Calderclere, *qua* legal heir or at law, as is to be presumed in the circumstances, must equally have been so of William Douglas, who was the *sole previous* ascertained *possessor*, or of Lidisdale, whose *nephew* and heir withal, in reference to Dalkeith, he has been already proved, (see Nos. 9 and 10,) which not only corroborates that link, but necessarily, from such anterior possession of Kincavil and Calderclere, on the part of Sir William, identifies him again *qua* William Douglas the grantee in the same, in terms of Robert the First's charter, (No. 2 of what was *latterly* adduced,) with the "*son*" of "Sir James Douglas of *Laudonia*," his certain and explicit designation there, Q. E. D. It is also remarkable, that there is a grant by

* Clearly *Laudonia*.

Hugh Douglas, Lord of Jedworth Forrest, head of the main stock of Douglas, of half of the lands of Westerker, to "*William* Douglas de *Laudonia*,"* another striking coincidence, and detecting the Knight of Lidisdale under that specific style originally, just like his father's; and which, by the way, has peremptorily been denied him. The grant, without date, must have been before the middle of the 14th century, when the said Hugh figured; and what is even additionally important, it is directly derived from the Morton charter-chest, the repository of a family, who became the heirs-male of the knight.

Moreover, the following striking facts and considerations at once detach the latter from the *visionary* bastard of the good Sir James Douglas, as Mr. Innes proclaims him.

1. If he had been illegitimate, his *certain* nephew, James Douglas of Dalkeith, could never have succeeded him or his daughter (which is the same thing) in the lands of Dalkeith, Kincavil, and Calderclere, &c. because by our law a bastard can only have heirs of *his body*,† and *no collateral* heirs; so that infallibly, had Sir William been a bastard, the same would, on failure of himself and his daughter, have altogether escheated to the Crown, *qua* sole heirs, in exclusion of every other. But as the previous *collateral* heir *did succeed*, Sir William behoved to be perfectly legitimate, and not spurious, as is objected.

2. By a family settlement of all the Douglas estates in 1342, the component members *nominatim*, before, and at the time, are established to have been; 1. the good Sir James; 2. Hugh Lord of Dou-

* To this deed Hugh's seal is appended, which though not entire, has the *heart* uncrowned, being the oldest instance of that charge hitherto discovered in the family. Hugh was clearly predecessor of *William* Douglas, his nephew and heir, (the undoubted first Earl of Douglas, so created, as we know from Gray's Chronicle, in 1358,) the son of Archibald Douglas, his deceased brother, *who* only *subsequently* took up the Douglas succession and representation, through the settlement in 1342 already, (see ps. 83-4,) and to be afterwards noticed. Yet Mr. Innes asserts that the said William, "the first Earl of Douglas, *appears* to have been *curious in heraldry*, and was probably the *first* of the family who adopted the heart, (not yet crowned,") &c. (See his Preface to the Chartulary of Moray, p. xlvi.) I am sorry we must now transfer Earl William's knowledge of Heraldry (rather, it must be owned, lamely inferred by Mr. Innes,) to his respected uncle, Hugh, who might better have observed the eulogium of the accomplishment—while the ferocious Earl—far less a student or cultivator of art—was more famous for atrocious moral derelictions, such as assassinating the gallant Knight of Lidisdale, represented to be his god-father, and proving aggravatedly faithless to his lawful and noble spouse.

† See partly as to this undoubted fact, Peerage and Consistorial Law, ps. 416-17.

glas, his younger brother; 3. Archibald Douglas, (who had predeceased in 1342,) his youngest and only remaining brother; 4. William Douglas, son of the latter, (afterwards first Earl of Douglas,) and 5. Archibald Douglas, the *only bastard* son of the good Sir James; while Sir William Douglas of Lidisdale takes there, obviously, as heir-male collateral of the main stock, before the bastard. For this interesting settlement, see p. 83, *(last note, ibid.)*

There is mention of *no other immediate* members than *as numbered*, who must therefore be the only ones; but again, *contradictorily*, it happens that Sir William, the Lidisdale Knight, had a bastard *brother* of the name of *Sir William*, and a paternal *uncle*, Sir *Andrew*,* both alive in 1342, and in 1351, (see authorities at the outset No. 7,) who are thus *perfect strangers* in the *main* Douglas pedigree, and of course make the "Flower of Chivalry" equally so; for if the knight had been bastard son of the good Sir James, these two would have been presumptively called in the settlement in 1342, the one (Sir Andrew,) *necessarily* as brother of Sir James, and the other (Sir William) as his additional natural son. The further fact of the bastardy here, might have been little attended to, for in the very settlement in 1342, Archibald Douglas, afterwards Lord of Galloway, bastard son of the good *Sir James, is called*; (see p. 84.) If we admit then Mr. Innes's assertion, the *latter* would, hence not only have a hitherto unknown and wholly rejected younger brother fastened upon him, but deeper immorality in the person of Sir William, as a *third* bastard son. Nay, James Douglas of Dalkeith, the mortifier in 1406, being *paternal nephew* of his "*uncle*" the *Knight* of Lidisdale, through *John*, his younger brother, (see previous authorities, Nos. 6 and 10), not only *John*, but the *entire* noble house of Dalkeith,† with all its dependents, might in like manner most incredibly and preposterously be saddled on the "good" knight as his spurious offspring, (thus having a bosom as ample and capacious as Abraham's,) certainly including the present Earl of Morton,—all of whom Mr. Innes, by one fell swoop, would callously doom to inextricable bastardy! We thus again have another clear *reductio ad absurdum* against him.

* See Fordun, Goodall's Edit. Vol. II, pp. 332–3. These two, the said brother and subsequent uncle, are evidently the witnesses to the grant by the Knight of Lidisdale to the See of Glasgow. See p. 82. † As to whom partly, see No. 10.

3. A *real bastard* son of the "good *Sir James*," (in fact his *only* one)—Archibald Douglas, (Lord of Galloway,) as even fixed by the context, is actually called to the succession by the Douglas settlement in 1342, failing the Knight of Lidisdale, &c. —*qua* "*the* SON" of the *former*; (see p. 84, n.) Can it, then, for a moment be pretended that the Knight of Lidisdale, figuring in the same deed, if, as according to Mr. Innes, a bastard son likewise of the same patriotic individual, would not there be similarly described?—but as he is not,—as there is not the slightest indication of such relationship between them, *ex tenore verborum*, he could never have been so, but must have solely been the person I represent. Combining, then, all the preceding weighty facts, and evidence,—some abstractedly, enough for the purpose,—with the striking circumstance that there is not a *single old* authority* which gives the Knight of Lidisdale the spurious *status* in question, I submit that it is utterly untenable; nay, that it has been repeatedly refuted and shattered both directly and indirectly, in every possible way and method.

Imputations of illegitimacy should never be risked without fair reason, which in the above instance may be said to be wholly wanting, not only upon just equitable grounds, but because the law even in a doubtful case of the kind, always presumes in favour, and inclines to the side of legitimacy,—and certainly still less as Mr. Innes has yet attempted so gratuitously, in this case,—upon a mere "I suppose."†

IV.

EXCERPTS FROM THE MS. FAMILY HISTORY, OR MEMOIRS OF THE MORAYS OF ABERCAIRNEY, PREVIOUS TO 1731. *(Referred to at p.* 117 *note*; *and see also p.* 86, *et seq.)*

"On this side of time there is always something that interupts the pleasures, and quiet men propose, even in their strictest retreat from the world, and so it happened with this gentleman, (Robert Moray of Abercairney), for whilst he was meditating

* Of course, I do not look upon Godscroft as such, in his unsupported allegation, little withal as he is relied on by Mr. Innes, see p. 85.

† See p. 83.

nothing but a quite and solitary life, and the retrieving the disorders his affairs were in, by good management at home, he found a powerful adversary to grapple with, for no less than the *being* of his Family. John, Earl of Athole, created Marquis by King Charles II. in the year 1676, had several considerable posts and pensions conferred upon him by his Majesty. And being naturally vain and ambitious, was so full of himself by those honors and preferments that he could not bear the thought of another having the *only just* title to the *Chiefship* of the name of Murray. He very well knew by his own charter-chest the tradition of the Country, and from the dealers of antiquity, that Abercarney was the true representative of the ancient Moravii, and therefore his Lordship was resolved, being a great man in favour at Court, &c. to do something which, as he thought, might afford a specious handle to exclude Abercarney and his successors from their birth-right, believing Abercarney knew little of the story himself, &c. In order to effectuate this design, the Marquis of Athole invited Abercarney to an intertainment at Tillibardine, where he had conveened a company fitt for his purpose, and there over a hearty bottle, and after some softening and soothing speeches by which the Marquis coxt Abercarney with great pretences of friendship, and his sincere desire to serve him with his interest at Court, proposed to Abercarney to sign a paper acknowledging his Lordship Chief of the name of Moray.*

Abercarney, altho' not a little surprized with the demand, answered with a great deal of temper, that he accepted these kind expressions of friendship, his Lordship was pleased to make, with a great deal of esteem. And for his part, he was resolved to cultivate that intire friendship had been betwixt their predecessours, and had continued in their families to that day. But excused himself from doing an action (that) might be a reflexion on him, and give his posterity just ground to think he had been an unworthy representative of their family, if he did any thing that might be construed a giving away his birth-right, especially seeing none of the name had evir had the assurance to ask any such thing before either of his predecessors or of him.

This unexpected answer soured the Marquis to that degree, that from thence furth he greedily sought for all occasions to

* Such procedure was not unusual at the time, and even later, on the part of powerful individuals, as the Marquis is represented.

ruine and destroy Abercarney and his family, and indeed, it was not long before he found one by which he had well near effectuat his ungenerous design.

Sir William Murray of Ochtertyre, the first Knight of that family, and who, by the bye, was generally reported to have laid the foundation of their present wealth by the plunder he got in England with the Covenant army, in which he served, and his share of the King's price, whom they sold so infamously at Newcastle. This renowned Knight, at a meeting in the town of Perth, had by some insolent expression provoked Abercarney to give him a box in the ear, which it seems he thought fit to resent after another manner than gentlemen use to do upon such occasions, as will appear by the after narrative.

Ochtertyre was a curator of Buchanty, who was a creditor to Abercarney in a soum not exceeding 10,000 merks, and a cadet of his family. This young gentleman's estate was almost life-rented by his mother, who had married a second husband, so that the young man was straitened for money to defray the necessary charge of his education. Buchanty therefore applied himself to Abercarney, his friend, and debitor for the soum he owed him. Abercarney was a young man, unacquainted with the law, generous in his temper, and frankly payed the money to Buchanty. But he being minor, and not master of his papers, could not deliver up the principal band, which was in Ochtertyre's hand, as Buchanty's curator. So that Abercarney relyed on Buchanty's discharge, honestly thinking that the whole money being duly payed to its right owner, and having gote his discharge, that the debt was sufficiently extinguished. Ochtertyre, full of resentment for the box Abercarney had given him, altho' he well knew that the money was honestly payed, yet maliciously put Abercarney's bond in the Register, and charged him with horning to make payment. Abercarney, as has been said, being unacquainted with the law, relyed on Buchanty's discharge, and neglected the charge of horning. In the meantime his adversary took care to have him denounced duly, and proceeded no further till a year and day was elapsed.

Sir William Moray of Ochtertyre was present at the entertainment at Tillibardin, when Abercarney had, like himself, refused to the mean thing the Marquess had proposed to him, and knew that his Lordship would be glad of such a handle against Aber-

carney. Therefore he quickly advertised the Marquis to put in for the gift of Abercarney's liferent escheat, (which the Marquis accordingly got,* and used as a means of oppression and persecution against Abercarney for sometime after), &c.

So much for an envied and supposed inherent right of chieftainship in those arbitrary times. One more excerpt from this characteristic and family production.

" I must likewise advertise the posterity of this worthy *gentleman,*† *(the Abercarney at the time)*, that the pique of the family of Athole, and its partisans, from the sense they have of what I think appears very plain in the foregoing memorial, that Abercarney is the only true representative, in the direct line, of the heirs-male of the illustrious house of Bothwell, and consequently of the ancient Moravii, which was never pretended to by any of the Athole family, nor from what I can learn, by any other, till the late Marquis,‡ as I have already taken notice of; and because neither Abercarney nor his father were so meanly disposed as to give up their birth-right to the pride and vanity of that noble Lord, and the high quality of his successor, they, and their partisans, have conceived such aversion to Abercarney's family, that they are ready to catch at all opportunities to lessen it, (as we have showen you before, they have already attempted), they will surely not miss the first occasion they can find to ruin it entirely; and therefore, as the vertue of the present Abercarney is by all means to be imitated by his successors, they must also take care, as he has hitherto done, not only to incress their family in its estate, and to be very carefull of the *branches*‖ of it, which is the most proper and innocent means of strengthening themselves by, but also be sure never to put it into the power of the family of Athole, or their partisans, to do them any essential hurt. Because former experience shews how ready they are to fish for occasions to destroy Abercarney's family, and seeing the *same ground* of *pique* will *subsist as long as the family does*, the representatives of it will do well to beware of these dangerous enemies, and especially observe, *never* to make *alliances* with

* This was likewise in the circumstances, *no uncommon* expedient with us, formerly, and hence the more deserving notice, as illustrative of the bent and manners of the times.

† I do not know precisely who the writer of these lucubrations is, though a family relative, or connection, as may be presumed.

‡ I am afraid this will not *much* assist Mr. Innes in his Tullibardin attempt.

‖ He *hence may be* a cadet.

them, by marrying any of their daughters, or neir kinsmen, whose interests are interwoven with theirs, which, in many events, very likely to happen, may prove a fatale occasion of lulling the family of Abercarney asleep, and their enemies, by that handle, take occasion to use them as Samson was by his beloved Dalila," &c.*

* Cato's *teterrimum odium* to Carthage could hardly be greater than the worthy writer's to the *relentless* and *destructive* house—it would seem in its turn again—of Tullibardin—in respect to whom no christian forbearance, or attempt at accommodation, is ever to be thought of, but eternal jealousy and distrust in a small, cunning, and wary way. May we not—otherwise unconcerned spectators—rejoice that the ice formerly, or rather the "winter of discontent," is likely, in our days, to prove "glorious summer," by a suppression of all such antiquated deadly jealousies, through a connection such as the Abercairney Historian would have condemned, but which is likely most felicitously to knit together two of the oldest and most baronial of the Perthshire families—not to add, Scotch—each in their *respective* capacities—whatever the ultimate Moravian source may be—by kindred bonds, that may be indissoluble.

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My Last Chapter.

THE CAUSES OF MY RAGE—MY FAVOURITE SUBJECT TREATED IRREVERENTLY—THE RIDDELLS DISHONOURED—MY ENEMY'S INDEXES AND MINE—BEST MANNER OF EXPRESSING DIFFERENCE OF OPINION FROM GREAT JUDGES—MY OWN MISTAKES FRANKLY ACKNOWLEDGED—MY TRANSCENDENT MERITS.

Since my performance has been published, I find that people understand nothing of it except that I am in a great passion with Mr. C. Innes, and nobody can guess the reason. I don't know why this is so. It seems to myself, that I write a very good style, and with great clearness of enunciation. Indeed, in my own opinion, I am the only person that can write sense on such matters as I deal in. But, as I feel I have very relevant grounds of anger, if I could only make them understood, I have asked a friend and brother antiquary, with whom I have not yet quarrelled, to explain in the vernacular the real *causa belli;* and I declare this shall be my last chapter—for the present.

In the first place, then, Mr. Innes has presumed to say, that the dispute about the legitimacy of Robert III. (who reigned only 400 years ago) has now taken its proper rank as a mere subject of antiquarian curiosity. Now, this is intolerable. He ought to have known that I myself have spent a great deal of time, and dug out a great many old papers, and written a great many chapters, all to bring into notice this most interesting subject; and I have shown, or will yet, please God, show to the satisfaction of the most sceptical, that Robert III. was nothing but a bastard,—a *spurius*,—born in incestuous concubinage,—*ex damnato coitu*. Nevertheless, on this, as on all other subjects, I reserve myself a right to change my opinion, and to fight on the other side; and if any man pretends to understand my argument, and says *ditto* to me, I shall be tempted to demonstrate, that *ignorantia* saved

the parents from sin, and their offspring from the pains of bastardy.

This is one great cause of my enmity to Mr. Innes. He treats the subjects on which I spend my life, as "matter of mere antiquarian curiosity." I don't indeed say that they have much practical use. But it sounds well to allege that a dispute about Papal dispensations may settle the marriage law. At all events, in the books which I write on the subject, I can bring in a good many stories of that kind which I love, and which would not be allowed anywhere else; but which people cannot object to in a law book.

In my own justification, however, I must say this is not my only ground of quarrel. Mr. Innes most presumptuously and impudently has said, that the Riddells, that illustrious Norman family, of which "I happen to be no very distant cadet," took their name from the barony of Riddell, instead of the lands being called after them. This "gross error and misrepresentation" would be a grave offence in any one; but only observe from whom the horrible calumny comes. Mr. Innes, "I believe, is said to be a cadet of the family of Innes of Innes, in Morayshire, who derive their origin from an *unsurnamed* Berowald—the *naked* Berowald—and Innes patriarch—the father of obscure descendants—*un*-witnessing Royal grants—an utter stranger—who literally introduces himself subsequent to the middle of the twelfth century,"* and whose descendants were, of course, obliged to take a vulgar territorial surname. Now, for a man sprung of such a stock, (or supposed to be so, for I will not vouch for his descent,) to presume to have an opinion about the origin of the name of Riddell is really monstrous. Flesh and blood cannot bear it. Positively, I will print the original charter of the first Riddell some day, which I have spoken so much about, and which nobody has seen.

These are my chief causes of grievance, and I think they are enough to justify my rage against Mr. Innes. Minor errors I could have forgiven. I could have passed over the fault of his index-maker, who has on one occasion omitted the reference to the page of the book, and in two others has actually called a person *de*

Stewartiana, p. 107.

* These expressions marked as quotations are from my last performance, *Stewartiana*. I could find none more relevant.

Morevil in the Index, who is properly printed *de Moravia* in the Text. And yet I think this is a great concession for me, for my readers must be aware what store I set by my indexes. In a recent performance, I wished to appear modest, and acknowledged "I may latterly have made my margin too loquacious," but I find it catches the eye, and looks light and jaunty to put some little hits on the margin, and from thence into the index or table of contents.

Peerage and Consistorial Law, p. xv.

On another point on which I have attacked Mr. Innes, I have really a great fellow feeling for him. I have marked on my loquacious margin,—*Strange and palpable error of Mr. Innes in regard to Lord Hailes, to the unmerited prejudice of his Lordship.* I have there twisted a mistake of one D. Dalrymple for another, and the use of the word *incautiously*,—into an attack upon Lord Hailes, for "obstructing by his imprudence the path to important antiquarian knowledge." I thought this at the time very clever, and I still rather triumph in it. But, unluckily, everybody sees that the error is not of the slightest importance, and that the expressions mean no disrespect towards Lord Hailes at all. In the same way, I pretended to be much shocked at Mr. Innes's remark about Dempster falling into an unscholarlike error (p. 121) about the word *herbergare*, which, he says, was the old name for the Canongate. But that was only because we "antiquaries are not at all indisposed to a hit when it may be practicable." The truth is, I care nothing about Dempster, who, we all know, was a tattling old gentleman; and I only praise Lord Hailes because I find his authority convenient to support some peerage cases which I am engaged to defend. If I had been on the other side I would have abused him as I have done other Judges who differed from me. Have I not said of Lord Mansfield and Lord Rosslyn that they "perverted and outraged our peerage law?" Have I not spoken of the "absurd and preposterous notions" of Lords Mansfield and Camden—of the "preposterous and absurd notion" of Lords Mansfield and Rosslyn? Have I not pointed out the "absurd denial of Lord Mansfield and others that a peerage might be surrendered without the King's leave, which notion, he sagely assumes, is manifestly wrong and against common sense, while he, as usual, rests the induction on nothing?" Nay, I have put in my *Contents*

p. 42.

Peer and Cons. Law, pref. p. xii.

Contents, chap. iii. Ibid.

Peer and Cons. Law, p. 54.

Peer and Cons. Law, contents, p. xxv. Ibid. Ibid. Ibid., p. xxix.

—"Confident and glaring misrepresentation by Lord Mansfield of the Oliphant case;" "Lord Mansfield flagrantly coined his arbitrary irrelevant law;" "His other glaring errors;" "Lord Mansfield's crude law and marked inadvertency;" "Self-contradiction of Lord Mansfield;" "Gross, inadvertent, and unpardonable misrepresentations by Lords Mansfield and Rosslyn to suit their arbitrary law, with striking contradiction and ambidexterity of the former." Is this enough, or shall I show how boldly I accused Lord Mansfield and Lord Chancellor Rosslyn, of "misre-

Ibid, p. 373.

presenting a decision, in order to extort support to their arbitrary theory;"—and how I put in my *Index*—"Lord Mansfield, his various errors, inadvertencies, crudities, devices, misconceptions, and striking contradictions?" This is merely to prove that I don't stand on respect generally shown to great names; and to show also what I consider the manly and proper way of expressing one's difference in opinion from great judges, especially when they are dead. I make no scruple of accusing Sir Thomas Hope, the Lord Advocate, of misstating events within his own time and knowledge; I

Peer. and Con. Law, p. 261, 434. Stewartiana, p. 119. Remarks on Scots Peer Law, p. 21, p. 14.

have a fling or two at Mr. Tytler and Mr. Thomas Thomson, though I do not venture to name the latter; I treat Mr. Sinclair and Mr. M. Napier with insolence. And, on the other hand, I can, when it suits me, quote, as high authority, Sir James Balfour, for a fact; and Mr. Wallace, the writer on ancient peerages, for a legal doctrine.

I can assure my readers that it is not the petty errors I have been able to gather in Mr. Innes's prefaces which have excited my indignation. I have said truly, in the preface to my own great per-

Peer. and Cons. Law, pref. p. xv.

formance, that in it, as in other big books, "there must be various blemishes and defects, and happy shall I be if an indulgent reader good naturedly exclaim, upon a due survey of my objects and remarks,—*non ego paucis offendar maculis.*" I am quite aware that any one who liked to pull them to pieces, might make a curious contrast between my first performance and my last, (my Remarks of 1833 and my Peerage Law of 1842,) and what more natural, when they were written on different sides of the question? I have made mistakes and blunders, indeed, of all kinds, of language, of sense, of law, and, what is more important, of pedigree.

Rein. 14.

In the "Remarks," I mis-stated the Kincardine case, which then was much in my way, where I called Earl Alexander the last

lineal heir-male of the patentee,—whereas every body knows the patentee had no children or lineal heirs. That, unluckily, stands recorded in print. In my present Stewartiana I announced, with firm tone and clear, that Darnley was Mary's first husband; but being admonished, I cancelled the leaf, and concealed that error. P. 51.

I was much in love with myself for discovering in an old charter, a reference to a place which Chalmers calls "Macbeth's Cairn," near Lunfanan. To be sure, the charter spoke of it as one stone, and seemed also to use strange liberty with the name of Macbeth, describing the place of the Court of the Earl of Mar, *apud lapidem de Mygbethe*. I did not observe that the *b* was very like a *v*, and I did not then know that Mygvethe or Migvy, is a very ancient name of a parish in Cromar, where the old Earls of Mar had a castle, and, of course, a place of court. How I wish this blunder had happened to Mr. Innes, or any one else than myself. I think, with my talent for graceful raillery and playful banter,—which is my *forte* in style,—I could have made a good chapter out of it. Stewartiana, p. 131.

My friend who assists me in this Chapter, and who has really a pretty knowledge of Latin, tells me that *religio loci*, has not much to do with the religion that goes to endowing a chapel, as I imagined it had, when I censured Mr. Innes at p. 123 of the "Stewartiana." I am sorry for this little slip, because I pique myself on my Latin, and love to make occasions to introduce little bits, as in that sweet passage from Ovid about Myrrha. St. p. 6.

"I believe I may say I have examined more of Scotch public and private records than any one." I said so before, and I repeat it. I have done nothing else since I left school. I have lived upon the dust of charters and commissary processes. It may be said I have not improved my reasoning powers, nor learnt from such authorities to write English. I care not; but it *is* a severe blow that I should be detected in ignorance of Scotch,—legal and commissary Scotch. And yet so it is. The famous Act of Parliament 1592 against Adulterers, enacted, that a woman divorced for adultery and re-marrying or living with her former husband, should not be "entitled to alienate her heritage either to her pretended husband or the successioun proceding of that pretendit mariage or *carnall daill*." Now, I thought somehow that the last words meant "issue," and so I have expounded them; and I have only lately understood that the *or* couples them with the word *mariage*, not with the word Stewartiana, p. 19. Peer and Consist. Law, p. 395.

successioun, and that *carnall daill* means nothing but "carnal dealing." Such slips may happen, even to me!

I must own, these dirty consistorial processes are apt to mislead one. It was all along of them, that I made that incredible blunder of averring, that the law knew no distinction between the degrees of consanguinity, within which marriage is forbidden by the Canons, and those established by the law of nature and the Mosaic law. The Scotch commissaries did not trouble themselves much about the difference, and I was content to take the law as they gave it me; and so I denounced Mr. Innes for heresy, while I find, after all, he has some foundation in a collection, called the Decretals, where a Pope Gregory IX. speaks a good deal about the degrees forbidden by the law of nature,—*jure naturali*,—and declares,—"ut in gradibus consanguinitatis *divina lege prohibitis* restitutioni aditus precludatur, sed *constitutione interdictis humana* restitutio locum habeat cum effectu, cum in *illis* dispensari non possit, et in *istis* valeat dispensari."

l. ii. t. 12.

But, after all,—*Non ego paucis*,—it will take a million of such faults to offend me,—especially if they are my own. But, then, I have serious objections to Mr. Innes still behind. In the matter of style and arrangement, I confess I am inclined to be particular. I have censured Mr. Innes, because there is "throughout his positions some distrust and indefiniteness betrayed, so different from the firm tone and clearness of enunciation inherent in *sure demonstration*"—by that I meant my own writing. Several parts of his language I object to. I object also to his saying too much about the palace of Holyrood, and too little about the castle of Darnaway. My practice is quite different. I always say exactly what should be said, exactly the proper quantity, and always in the proper place. My performances indeed, are models as to arrangement and diction. The "firm tone" and "clearness of enunciation" are only a part of my merits. I have introduced an entirely new style of writing—I may say, a new language. I do not like to boast, but I think this must be admitted at every sentence of my great performances. When I work it up, as one does for great occasions, I think my style is really astonishing. Take, for example, my Dedication, which to be sure, cost me great labour. Here it is, to close this volume, as it commenced the great work. I cannot go beyond it.

Stewartiana, p. 19.

P. 120. W. 101.

TO

THE RIGHT HONOURABLE

JOHN LORD LYNDHURST,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

&c. &c. &c.

AS THE ABLE, AND ACCOMPLISHED HEAD OF THAT TRIBUNAL,

BY WHOM THE FOLLOWING SUBJECTS,

BOTH BY OUR RELEVANT LAW AFTER THE UNION,

AND, IN PART, UPON A ROYAL REFERENCE,

(AS AT PRESENT,)

MAY BE DISCUSSED AND DECIDED,

THIS PERFORMANCE,

WITH HIS LORDSHIP'S PERMISSION,

IS RESPECTFULLY DEDICATED.